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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 187.

W. S. EMBREE, ELLIS GITTINGS, A. N. GITTINGS, ET AL.,
PLAINTIFFS IN ERROR,

vs.

KANSAS CITY AND LIBERTY BOULEVARD ROAD
DISTRICT OF CLAY COUNTY ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED JULY 2, 1914.

(24,289)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 20, 1915.

1 In the Supreme Court of United States.

W. S. EMBREE et al. (Plaintiffs in Error),
vs.
KANSAS CITY & LIBERTY BOULEVARD ROAD DISTRICT et al.
(Respondents in Error).

To the Clerk of the Supreme Court of the State of Missouri:

In compiling the record to be forwarded to the Supreme Court of the United States in the above entitled case you will please include the following documents or parts of documents:

1st. Petition for writ of error including the allowance of Chief Justice endorsed thereon.

2nd. Assignment of errors.

3rd. Writ of error.

4th. Return to writ.

5th. Citation and proof of service of citation.

6th. Bond.

7th. Certified copy of judgment and order granting appeal from the Circuit Court of Clay County, Missouri.

8th. Abstract of record of proceeding in the Circuit Court of Clay County, Missouri, pages 1 to 21 inclusive, and page 22 down to the words, "M. E. Lawson being produced, sworn and examined," etc. Also entries on pages 47, 48 and 49 showing filing of motion for new trial, motion for new trial, over-ruling of motion for new trial, filing motion in arrest, motion in arrest, over-ruling motion in arrest and signing and filing of bill of exceptions.

9th. Opinions rendered on first hearing of case in the Supreme Court of Missouri.

10th. Order granting re-hearing.

11th. Opinion rendered on final hearing in Supreme Court of Missouri.

12th. Appellants' motion for re-hearing, but not including the suggestions in support thereof.

13th. Order over-ruling motion for re-hearing, final *final* judgment in Supreme Court of Mo.

JOHN M. CLEARY,
Attorney for Plaintiffs in Error.

Service of the annexed Praecipe is acknowledged this 20th day of June, 1914.

CLAUDE HARDWICKE,
Attorney for Defendants in Error.

[Endorsed:] Filed Jun- 23, 1914. J. D. Allen, Clerk. Filed Jun- 23, 1914. J. D. Allen, Clerk.

2 In the Supreme Court of Missouri, 1914.

W. S. EMBREE et al. (Plaintiffs in Error),
vs.
KANSAS CITY & LIBERTY BOULEVARD ROAD DISTRICT et al.
(Respondents in Error).

UNITED STATES OF AMERICA,
State of Missouri, ss:

To the Honorable Henry Lamm, Chief Justice of the Supreme Court of the State of Missouri:

The petition of W. S. Embree, Ellis Gittings, A. N. Gittings, C. T. Pritchard, S. W. Allen and W. H. Alston respectfully shows that on the 2nd day of April, A. D. 1914, the Supreme Court of the State of Missouri, rendered a final decree against your petitioners in a certain cause therein pending wherein your petitioners, W. S. Embree, Ellis Gittings, A. N. Gittings, C. T. Pritchard, S. W. Allen and W. H. Alston, were plaintiffs and The Kansas City & Liberty Boulevard Road District of Clay County, Missouri, W. W. Cosby, A. W. Lightburne and T. J. Ward were defendants, affirming the judgment rendered therein by the Circuit Court of Clay County, Missouri, dismissing on final hearing the petition for an injunction of your petitioners and against the defendants, and adjudged the costs therein against your petitioners, as will appear by reference to the record and proceedings in said cause; and that said Court is the highest Court in said State in which a decision could be had.

3 And your petitioners claim the right to remove said judgment and decree to the Supreme Court of the United States by writ of error under Section 709 of the Revised Statutes of the United States because said proceeding is a suit brought to obtain an injunction restraining the defendants from issuing certain bonds in the sum of Seventy-seven Thousand ($77,000.00) Dollars to pay for the improvement of a certain road and from levying a benefit assessment tax against the lands of petitioners to pay the same, under and by virtue of Article 7 of Chapter 102 of the Revised Statutes of Missouri, 1909, as amended by an act entitled "Roads and bridges: special road districts: benefit assessments. An act to amend sections 10611, 10616 and 10620 of Article 7, Chapter 102, Revised Statutes 1909, relating to special road districts—benefit assessments—by striking out of each of said Sections certain words and inserting in lieu thereof certain other words, and by adding a new section to such article and Chapter to be numbered Section 10625*a*, providing that when the major part of certain tracts of land lie within certain distances of roads to be improved the whole of such tracts shall be held to lie within the same distances." Passed by the General Assembly of the State of Missouri, and approved by the Governor of said State on April 11th, 1911, and appearing in Session Acts of 1911 at page 373 et seq. and in which said suit it

was alleged and claimed by the petitioners that the levy of said tax would be a taking of the lands and property of these petitioners without due process of law contrary to the provisions of the 14th amendment to the Constitution of the United States in that said act provided for a levy and collection of said taxes and thereby a taking of paintiffs' property under the guise of a benefit assessment for the payment of the construction of a certain road without any legislative determination or declaration that plaintiff' lands, or any of them, were, or would be, in fact, benefited by the construction or the improvement of said road and without any hearing on that question, to wit, the question of whether plaintiffs' lands would be benefited.

4 That the judgment of said Circuit Court of Clay County, Missouri, dismissing the plaintiffs' petition and adjudging the costs against them and the judgment of the Supreme Court of the State of Missouri, confirming the judgment of the Circuit Court of Clay County, Missouri, deprives these petitioners of their property without due process of law contrary to said 14th amendment to the Constitution of the United States and that said judgment erroneously holds that said act, to wit, Section 7, of Article 102, as amended as aforesaid, contains and is a legislative determination or legislative declaration of the fact that plaintiffs' lands would be benefited and therefore gives to these petitioners no opportunity to be heard on that question, but results in taking their property, as aforesaid, without a hearing on the question of whether their land is or is not benefited contrary to the provisions of said 14th amendment. All as appears by the record of the proceedings in said case which is herewith submitted.

Wherefore your petitioners pray the allowance of a writ of error into the Supreme Court of the United States and for citation and supersedeas; and your petitioners will ever pray, etc.

(Petitioners:) W. S. EMBREE,
ELLIS GITTINGS,
A. N. GITTINGS,
C. T. PRITCHARD,
S. W. ALLEN,
W. H. ALSTON,
By JOHN M. CLEARY,
Attorney for Petitioners.

JAMES S. SIMRALL,
ERNEST SIMRALL,
WILLIAM A. CRAVEN,
HARRIS L. MOORE,
Of Counsel.

Let the writ of error issue as prayed.

HENRY LAMM,
Chief Justice of Supreme Court of the State of Missouri.

Dated June 2d, 1914.

4½ [Endorsed:] W. S. Embree et al. vs. Kansas City & Liberty Boulevard Road Dist. et al. Petition for writ of error. Filed Jun- 2, 1914. J. D. Allen, Clerk. Craven & Moore, Lawyers, 213 West Spring Street, Excelsior Springs, Missouri.

5 In the Supreme Court of Missouri, 1914.

W. S. EMBREE et al. (Plaintiffs in Error),

vs.

KANSAS CITY & LIBERTY BOULEVARD ROAD DISTRICT et al. (Respondents in Error).

Assignment of Errors.

Now come the above named plaintiffs in error and file the following assignment of errors upon which they will rely in their prosecution of their writ of error upon the records, proceedings and judgment in the above entitled cause:

I.

The Supreme Court of Missouri erred in holding and adjudging the Statute, Article 7 of Chapter 102 of the Revised Statutes of Missouri, 1909, as amended by an act entitled "Roads and Bridges: Special Road Districts: Benefit Assessments. An act to amend sections 10611, 10616 and 10620 of Article 7, Chapter 102, Revised Statutes 1909, relating to special road districts—benefit assessments—by striking out of each of said Sections certain words and inserting in lieu thereof certain other words, and by adding a new section to such Article and Chapter to be numbered Section 10625*a*, providing that when the major part of certain tracts of land lie within certain distances of roads to be improved the whole of such tracts shall be held to lie within the same distances approved, etc.," to be a valid and Constitutional law and especially in holding that said Statute did not contemplate the taking of property without due process of law contrary to the 14th amendment to the Constitution of the United States.

6

II.

The Supreme Court of Missouri erred in holding that the proceedings to issue bonds to pay for the improvement of a road and the levy of a tax thereunder on plaintiffs' lands under and by virtue of said Statute was not a taking of said lands and did not deprive plaintiffs of their said property without due process of law contrary to said 14th Amendment to the Constitution of the United States.

III.

The Supreme Court of Missouri erred in holding and adjudging that the said Statute was a legislative determination of the fact that

plaintiffs' lands would be, in fact, benefited by the construction of said road, and therefore the assessments and collection of benefits therefor against plaintiffs' lands, was not a taking of said lands without due process of law contrary to said 14th Amendment to the Constitution of the United States.

JOHN M. CLEARY,
Counsel for Appellants.

JAMES S. SIMRALL,
ERNEST SIMRALL,
WILLIAM A. CRAVEN,
HARRIS L. MOORE,
Of Counsel.

6½ [Endorsed:] W. S. Embree et al. vs. Kansas City & Liberty Boulevard Road Dist. et —. Assignment of Errors. Filed Jun- 2, 1914. J. D. Allen, Clerk. Craven & Moore, Lawyers, 213 West Spring Street, Excelsior Springs, Missouri.

7 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the Judgment of a plea which is in the said Supreme Court, before you, at the October Term, 1913, thereof, between W. S. Embree, Ellis Gittings, A. N. Gittings, C. T. Pritchard, S. W. Allen, and W. H. Alston, Plaintiffs in Error, and Kansas City & Liberty Boulevard Road District of Clay County, W. W. Cosby, A. W. Lightburne and T. J. Ward, Defendants in Error, a manifest error hath happened, to the great damage of the said Plaintiffs in Error, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy Justice done to the parties aforesaid in this behalf, do Command You, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, so that you have the same at Washington, D. C., on the first day of July next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White Chief Justice of the Supreme Court of the United States, this second day of June, A. D. 1914.

Issued at office in the City of Jefferson with the seal of the District

Court of the United States for the Central Division of the Western District of Missouri.

[Seal of the United States District Court of Missouri, Central Division, Western District.]

JOHN B. WARNER,
Clerk of the District Court of the United States for the Central Division of the Western District of Missouri,
By H. C. GEISBERG, *Deputy.*

Allowed by
HENRY LAMM,
Chief Justice.

[Endorsed:] Filed Jun- 2, 1914. J. D. Allen, Clerk.

8 In the Supreme Court of Missouri, in Banc.

And thereafter, to-wit, on June 2nd, 1914, the following further proceedings were had in said cause and entered of record:

17450.

"W. S. EMBREE et al., Appellants (Plaintiffs in Error),
vs.
KANSAS CITY & LIBERTY BOULEVARD ROAD DISTRICT et al., Respondents (Defendants in Error).

Now at this day there is presented to the Hon. Henry Lamm, Chief Justice of the Supreme Court of the State of Missouri, in Chambers, a petition for a writ of error to the Supreme Court of the United States, a writ of error to the Supreme Court of the United States, an assignment of errors and bond in the sum of One Thousand Dollars ($1,000), which said writ of error is allowed, said assignment of error filed, said bond approved and ordered filed and made a part of the record herein."

And thereafter, to-wit, on June 17th, 1914, the following further proceedings were had and entered of record in said cause:

17450.

"W. S. EMBREE et al., Appellants (Plaintiffs in Error),
vs.
KANSAS CITY & LIBERTY BOULEVARD ROAD DISTRICT et al., Respondents (Defendants in Error).

Now at this day there is filed herein a citation, signed by Hon. Henry Lamm, Chief Justice of the Supreme Court of Missouri, directed to the said Respondents (Defendants in Error) citing and

admonishing them to be and appear in the Supreme Court of the United States, at Washington, D. C., within thirty (30) days
9 from the date thereof, (June 2nd, 1914), to show cause, if any there be, why the judgment rendered against the said Plaintiffs in Error should not be corrected."

And thereafter, to-wit, on June 23rd, 1914, the following further proceedings were had and entered of record in said cause:

17450.

"W. S. EMBREE et al., Appellants (Plaintiffs in Error),
vs.
KANSAS CITY & LIBERTY BOULEVARD ROAD DISTRICT et al., Respondents (Defendants in Error).

Now on this day come again the Plaintiffs in Error and file herein their Praecipe for a transcript of the record, in this cause, with due acknowledgement of service thereon."

10 THE UNITED STATES OF AMERICA:

To Kansas City & Liberty Boulevard Road District of Clay County, W. W. Cosby, A. W. Lightburne, and T. J. Ward, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of Missouri, wherein W. S. Embree, Ellis Gittings, A. N. Gittings, C. T. Pritchard, S. W. Allen, and W. H. Alston, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry Lamm, Chief Justice of the Supreme Court of Missouri, this second day of June, in the year of our Lord One Thousand Nine Hundred and Fourteen.

HENRY LAMM,
Chief Justice.

UNITED STATES OF AMERICA,
Central Division of the Western
District of Missouri, ss:

I hereby acknowledge due service of the within Citation, this 6th day of June A. D. 1914.

CLAUDE HARDWICKE,
Attorney for Defendants in Error.

[Endorsed:] United States Circuit Court, Western District of Missouri, Central Division. —— —— vs. —— ——. Citation. Filed Jun- 17, 1914. J. D. Allen, Clerk.

11 In the Supreme Court of Missouri, 1914.

No. 17450.

W. S. EMBREE et al. (Plaintiff- in Error),
vs.
KANSAS CITY & LIBERTY BOULEVARD ROAD DISTRICT et al. (Respondent- in Error).

Know All Men By These Presents, that we, W. S. Embree, Ellis Gittings, A. N. Gittings, C. T. Pritchard, S. W. Allen and W. H. Alston, as principals, and Wm. Chrisman and Wm. E. Bell as sureties, are held and firmly bound unto Kansas City & Liberty Boulevard Road District, W. W. Cosby, A. W. Lightburne and T. J. Ward, and their assigns, in the sum of One Thousand ($1,000.00) Dollars, to be paid to the said obligees, their successors, representatives and assigns, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seal- and dated this 1st day of June 1914.

Whereas the above named W. S. Embree, Ellis Gittings, A. N. Gittings, C. T. Pritchard, S. W. Allen and W. H. Alston, the plaintiffs in error, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment heretofore rendered in the above entitled cause, by the Supreme Court of the State of Missouri.

Now therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect, and answer all costs and damages, if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

S. W. ALLEN. [SEAL.]
A. N. GITTINGS. [SEAL.]
ELLIS GITTINGS. [SEAL.]
C. T. PRITCHARD. [SEAL.]
WM. CHRISMAN. [SEAL.]
W. E. BELL. [SEAL.]

12 STATE OF MISSOURI,
County of Clay, ss:

On this 1st day of June 1914, before me personally appeared, S. W. Allen, A. N. Gittings, Ellis Gittings, C. T. Pritchard, Wm. Chrisman and Wm. E. Bell, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in said county the day and year first above written.

My term expires Dec. 29, 1914.

[SEAL.] WILLIAM A. CRAVEN,
Notary Public for Clay County, Mo.

13 STATE OF MISSOURI,
County of Clay, ss:

I, Andrew C. Holt, Clerk of the Circuit Court within and for the County of Clay, in the Seventh Judicial Circuit of the State of Missouri, do hereby certify that I am personally acquainted with Wm. E. Bell and Wm. Chrisman, the sureties in the bond hereto attached, and that they are residents of said County and State, and that each is worth, over and above their legal exemptions, the sum of Ten Thousand Dollars.

Given under my hand and the seal of said court, at the City of Liberty in the said County of Clay, on this 3rd day of June, A. D. 1914.

[SEAL.]

ANDREW C. HOLT, *Clerk*,
By DAN S. BRADLEY, *Deputy*.

Approved June 5, 1914.
HENRY LAMM, *C. J.*

14 In the Supreme Court of Missouri, in Banc, October Term, 1912.

Be it remembered, that on the 21st day of December, A. D. 1912, there was filed in the office of the Clerk of this Court a duly certified transcript of Judgment and order allowing appeal of the Circuit Court of Clay County, Missouri, in a certain cause wherein W. S. Embree and others were Plaintiffs-Appellants, and the Kansas City & Liberty Boulevard Road District and others were Defendants-Respondents, which said judgment and order granting appeal are in words and figures as follows, to-wit:

15 And afterwards, on the same day last aforesaid, the following further proceedings were had in said Court in said cause, to-wit:

W. S. EMBREE et al.
v.
KANSAS CITY — LIBERTY BOULEVARD ROAD DISTRICT et al.

Now on this 14th day of December, A. D. 1912, come the plaintiffs by their attorneys, and deposit with the Clerk of this Court the docket fee of ten dollars provided by law in cases of appeal, and, by leave of court, file the affidavit of James S. Simrall, and pray for an appeal herein: on consideration of which, it is by the court ordered that said appeal be hereby allowed the plaintiffs to the Supreme Court of the State of Missouri.

STATE OF MISSOURI,
County of Clay, ss:

I, Andrew C. Holt, Clerk of the Circuit Court within and for the County of Clay, in the Seventh Judicial Circuit of the State of Mis-

souri, do hereby certify that foregoing is a true copy of the original entry of the Judgment,—together with the order granting the appeal,—rendered by said court in a certain cause lately pending therein, wherein W. S. Embree and others were the plaintiffs and Kansas City — Liberty Boulevard Road District et al. were defendants, as fully as the same remain of record in my said office.

Given under my hand and the seal of said court, at the City of Liberty in the said County of Clay, on this 20th day of December, A. D. 1912.

[SEAL.]

ANDREW C. HOLT, *Clerk*,
By DON S. BRADLEY, *Deputy*.

CRAVEN & MOORE,
SIMRALL & SIMRALL,
Attorneys for Plaintiffs.
CLAUDE HARDWICKE,
Attorney for Defendants.

16 STATE OF MISSOURI,
County of Clay, ss:

In the Circuit Court of Clay County, in the Seventh Judicial Circuit of the State of Missouri.

Before the Honorable Francis H. Trimble, Judge.

W. S. EMBREE et al., Plaintiffs,
v.
KANSAS CITY LIBERTY BOULEVARD ROAD DISTRICT et al., Defendants.

Be it remembered, that, heretofore, to-wit, on the 14th day of December, 1912, the same being the 21st day of the regular November term of said court for said year, the following proceedings were had in said court in said cause, to-wit:

No. 6827.

W. S. EMBREE, ELLIS GITTINGS, A. N. GITTINGS, C. T. PRITCHARD, S. W. ALLEN, and W. H. ALSTON,
v.
THE KANSAS CITY LIBERTY BOULEVARD ROAD DISTRICT OF CLAY County, Missouri, W. W. Cosby, A. W. Lightburne, and T. J. Ward.

Now on this 14th day of December, A. D. 1912, come the parties, by their respective attorneys, and the court, after due consideration of the matters in issue herein, and being now sufficiently advised in the premises, doth find that there is no equity in the petition of the plaintiffs, and thereupon denies the prayer thereof.

Therefore, it is by the court considered, ordered, adjudged and decreed that the petition of the plaintiffs be hereby dismissed, and

that the defendants go hence without day, and recover of the plaintiffs their costs and charges in this behalf expended and incurred, and have thereof execution.

17 In the Supreme Court of Missouri, in Banc.

And thereafter, to-wit, on April 25th, 1913, the Appellants (Plaintiffs in Error) filed herein their Abstract of the Record, which said Abstract of the Record is in words and figures as follows:

18 In the Supreme Court of Missouri, April Term, 1913.

W. S. EMBREE, ELLIS GITTINGS, A. N. GITTINGS, C. T. PRITCHARD, S. W. ALLEN, and W. H. ALSTON, Appellants,

vs.

THE KANSAS CITY-LIBERTY BOULEVARD ROAD DISTRICT OF CLAY County, Missouri, W. W. Cosby, A. W. Lightburne, and T. J. Ward, Respondents.

Appellants' Abstract of Record.

The petition in this suit was filed in the Circuit Court of Clay County, at Liberty, Missouri, on the first day of August A. D. 1912, by W. S. Embree, et al., against The Kansas City-Liberty Boulevard Road District of Clay County, Missouri, et al.

Defendants were duly served with summons and answered.

The first amended petition in this suit was filed on the 9th day of December A. D. 1912, and is in words as follows:

First Amended Petition.

Plaintiffs for cause of action state that they and each of them own lands within the limits of the assessment road district hereinafter described.

19 That the defendant, Kansas City-Liberty Boulevard Road District of Clay County, Missouri, claims to be a road district and political subdivision of the State organized under and by virtue of Chapter 102 Article 11 of the Revised Statutes of Missouri, 1909, and amendments thereto

That the defendants, W. W. Cosby, A. W. Lightburne, and T. J. Ward claim to be the commissioners of said road district qualified and acting as such at the present time.

1. That the said defendants, Cosby, Lightburne and Ward claiming to act as commissioners, as aforesaid, of said road district, called a pretended general meeting of the land owners of said district on the 15th day of July 1912, and submitted to the said land owners' meeting, certain pretended reports and estimates for improving a road in said district and procured a vote thereon.

That said pretended estimates, among other things included the cost of building and improving a road as therein set forth through

the Village of North Kansas City and the City of Birmingham, that the Village of North Kansas City is a village and Birmingham is a city of the fourth class duly incorporated as such under the laws of the State of Missouri.

That at said pretended meeting, a vote was taken upon the question "shall the road mentioned in said report be constructed or improved according to any of the plans and out of any of the materials therein set out and the costs therein charged agains- the land in said district?"

That on said question, the land owners representing a majority of the land in said district did not vote "yes" and said question was not carried as provided by Section 10616 and amendments thereto.

But that said pretended commissioners wrongfully and fraudulently for the purpose of appearing to have the right to levy
20 said tax and issue said bonds, claim the right to count and will count divers proxies given to divers persons representing a large number of acres of land in said district, but that said proxies were not, in fact, given or signed by the persons owning said land; that said proxies were void and that there is no authority to vote by proxy on said question.

That thereafter a vote was taken on the question "what materials shall be used in constructing or improving said road?" That said defendants claim that the owners of a majority of the acres of land in the district owned by land owners present and voting, voted that the material to be used in improving said road should be such as are required for the improvement estimated at $70,000.00 when in fact a majority of said owners present did not so vote, but said commissioners claim the right to illegally count proxies of many owners not present or voting.

That under and by virtue of said proceedings said defendants claim the right to build and improve a rock road through the district and for the purpose of paying for said improvements claim the right to issue and sell the bonds of said district due in twenty years to the amount of $70,000.00 and to provide for the payment of said bonds by levying a tax or benefit assessment as provided by Section 10620 Revised Statutes of Missouri, 1909, and amendments thereto on all of the land included in the boundaries in said District including the lands owned by the plaintiffs.

That the said Defendants have no right and authority to issue and negotiate said bonds or levy or record said taxes or benefit assessments against the land of these plaintiffs for the following reasons:

1st. The said bonds, when so issued and negotiated, will constitute a debt in excess of the revenues of said road district for the current year and the same are not issued by the consent of two thirds
21 majority of the qualified voters as provided by Section 12, Article 10 of the Constitution of the State of Missouri.

2nd. Said bonds, when so issued, will constitute a debt of said road district in excess of five per cent of the assessed valuation of all the property in said district as shown by the assessment thereof next before the last contrary to the form of Section 12, Article 10 of the Constitution of the State of Missouri.

3rd. That said tax when levied will not be uniform upon the same class of subjects within the territorial limits of the authority levying said tax as provided by Section 10 Article 3 of the Constitution of Missouri, nor will said property be taxed in proportion to its value as provided by Section 10 Article 4 of the Constitution of Missouri.

4th. That the levy of said tax is an attempt to take the property of these plaintiffs without due process of law contrary to Sections 21 and 30 Article 2 of the Constitution of Missouri and the 14th Amendment of the Constitution of the United States.

In this that Article 7 of Chapter 102 and the amendments thereto, under which these defendants are claiming to act is an attempt by the legislature to delegate to any land owners who see fit to avail themselves of its provision the right to arbitrarily require adjoining land owners to contribute to the improvement of such road as they may designate and to appropriate property for that purpose wholly without regard whether the improvement of such roads will be a benefit to the land owners so required to contribute and said property is taken without any finding, declaration, notice or hearing as to whether such improvements will be a benefit on the value of plaintiffs' land, by any legislative or judicial body or even by the land owners or any judicial or ministerial officers before appropriating property for the improvement of such road, and that, in fact, the road proposed to be improved in this district will not be
22 a benefit, but will be a damage to the lands of these plaintiffs and many other land owners whose property is proposed to be taken therefor in said district.

5th. That the engineer's estimate and all proceedings as to said road are irregular and void because the same contemplate building and improving roads through incorporated cities and charging the cost of same against all of the land in said district.

6th. That the elections were not carried by the required votes as aforesaid, authorizing the levy of said tax.

That notwithstanding said election was not, in fact carried and notwithstanding that said tax and bonds will be irregular and void as aforesaid and that the said commissioners have no right to issue or negotiate said bonds, nor to levy or record said tax and pretended benefits against the lands of these plaintiffs. That said defendants will, unless restrained by the order of this court, proceed to sell and negotiate said bonds and to levy said tax and record the same as a lien against the lands of these plaintiffs and all other land owners in said district. That the said tax when so recorded will be an apparent lien and cloud upon the title of these plaintiffs. That these plainti-s are remediless at law and unless the defendants and each of them be restrained from issuing and negotiating said bonds and levying and recording said tax the plaintiffs will suffer irreparable damage.

Wherefore, plaintiffs pray that the Kansas City Liberty Boulevard Road District of Clay County and the defendants W. W. Cosby, A. W. Lightburne and T. J. Ward, be restrained and enjoined from issuing or negotiating said $70,000.00 of bonds as aforesaid, and

from levying or recording any levy of taxes or benefits to pay therefor against the lands of these plaintiffs.

CRAVEN & MOORE &
SIMRALL & SIMRALL,
Attorneys for Plaintiffs.

23 On December 10th, 1912, defendants filed their answer to plaintiffs' petition which (including amendments afterward made by interlineation) is as follows:

First Amended Answer.

Now comes defendants, and for answer to plaintiffs' amended petition, deny each and every allegation therein made or contained except such as may be hereinafter admitted.

For further answer, defendants state that the County Court of Clay County, Missouri, at the August Term thereof 1911, made an order, under and by virtue of Section 10612 of the Revised Statutes of Missouri of 1909, establishing and creating defendant Kansas City Liberty Boulevard Road District of Clay County, as a public road district, and setting out the boundaries of such district as so created and established.

That thirty days before the beginning of said term of said Court, a petition, signed by the owners of a majority of the acres of land within the district then proposed to be so established, and setting forth the proposed name of such district and giving the boundaries thereof and the number of acres of land in said district owned by each signer of said petition, and the whole number of acres of land embraced in said district, and the names of the other owners of land in said district so far as known, and the number of acres owned by each so far as known and praying for the organization of such public road district in accordance with and by virtue of Article VII Chapter 102 of said Revised Statutes and the acts amendatory thereto, was filed in the office of the Clerk of the County Court of said County, and said Clerk gave notice by at least three publications in a weekly newspaper printed in said county, and by at least five hand bills put up at public places within said district, of the presentation of said petition, and of the date of the beginning of the next regular term of said County Court (which was said
24 August Term, 1911) at which the same might be heard. Said notices contained the names of at least three signers of said petition, set out the boundaries of said proposed district (which embraced more than six hundred and forty acres of contiguous territory in said County) and notified all owners of land in said proposed district who might desire to oppose the formation thereof to appear on the first day of such regular term of court and file their remonstrance thereto.

That said order establishing such public road district was made after consideration by said court of remonstrances filed by Plaintiff Allen and Plaintiff Ellis Gittings, and all other remonstrances that were filed to the formation of said district and no appeal has since

been taken from the judgment of said Court establishing said public road district.

That at the August Term, 1911, of said County Court, said Court appointed defendants Lightburne, Cosby and Ward, who were and are owners of land within said district, commissioners of said district; and thereafter, to-wit: On the first Tuesday after the first Monday in January, 1912, an election was held in said district at which they were elected by the land owners of said district as commissioners thereof.

That, after being so appointed, and after qualifying and organizing as authorized and directed by sections 10613 and 10614 of said Revised Statutes, said Commissioners fixed a fair and impartial valuation on each tract of land within said district independent of the buildings thereon, and made a tabulated statement of such valuations, according to the numbers of the lands, names of owners if known and by the word "unknown" if not known and indicated therein what tracts lay within one mile of the road proposed to be improved and what at a greater distance than one mile and less than two miles and, there being no lands in said district more than two miles from said road that fact was indicated by said tab-
25 ulated statement. Said tabulated sta-ement of valuations was thereupon signed by said commissioners and duly acknowledged by them.

Said commissioners thereupon requested the county surveyor of said county to draw up estimates of the cost of the road to be improved, which was designated to him by said commissioners, and is a road in said district, and he, under the direction of said Commissioners, made three estimates of cost of improving said road, and made a report, accompanied by maps and profiles of said road, specifying therein the portions of said road that should be graded and what filled, and what paved, and the character of work required for making every part thereof a permanent road and containing said three estimates, which were as follows:

First.

For grading said road, as indicated by profile and map accompanying said report, so as no grade thereon shall exceed 5½ percent and macadamizing a roadway thereon having a minimum width of not less than 15 feet and extending over the entire length of the road except bridges and thoroughly compacting the macadam and surfacing it with a mixture of mineral oil (or some other suitable mineral binder) and finely crushed stone:—$70,000.

Second.

For so grading said road and macadamizing a road way thereon having a minimum width of not less than 15 feet and extending over the entire length of said road except bridges and thoroughly compacting the macadam (but not surfacing it with a mixture of mineral oil or other mineral binder):—$65,000.

Third.

For so grading said road, and surfacing a roadway thereon
26 having a minimum width of not less than 15 feet and extending over the entire length of said road except bridges, with a mixture of Clay Sand or finely ground stone and mineral oil or some other suitable mineral binder:—$33,000.

Said commissioners directed that said report should not contain a statement of the proportionate cost that would be chargeable against each separate tract of land in the district, for the improvement of said road by any of the plans estimated, or the amount that would be payable yearly if the charge were distributed yearly through five years or if equally distributed through twenty years; so such report did not contain such a statement, and no such statement has since been made.

Said tabulated statement of valuations, and the engineer's (county surveyor's) report, together with the maps and profiles, when made to the satisfaction of said commissioners, were filed with the Secretary, and from the date of their filing were open to the inspection, under proper regulations of all owners of land within said district.

Upon the filing of said tabulated statement of valuations and said report, maps and profiles, said commissioners called a general meeting of the landowners of said district at a convenient place in said district for said meeting, and gave at least twenty days' notice of the time and place of such meeting and the purpose thereof, by at least ten printed handbills put up in public places in said district and by at least three publications in a weekly news paper published in said county. At such meeting said commissioners submitted said tabulated statement, and said report containing said estimates, together with said maps and profiles, made by the engineer, to the land owners for examination and explanation; and after consideration thereof, said commissioners took a viva voce vote of the land owners present on the following propositions:

27 First. Shall the road mentioned in said report be constructed or improved according to any of the plans and out of any of the materials therein set out and the costs thereof charged against the lands in said district?

Second. What materials shall be used in constructing or improving said road?

Third. Shall the cost be paid (1) at once, or (2) fix and determine the number of years, not exceeding twenty, through which such costs shall be distributed?

At such meeting each land owner was allowed as many votes on each of said propositions as he owned acres of land in said district. On the first of said propositions the owners of a majority of the acres of land in the district voted in the affirmative. On the second of said propositions, the owners of a majority of the acres of land in the district owned by land owners present and voting, voted that the materials that should be used in improving said road should be such as are required for the improvement so estimated to cost $70,000. On the Third of said propositions the owners of a

majority of the acres of land in the district represented by land owners present and voting, voted that the cost be distributed through twenty years.

Excepting plaintiff Embree, each of plaintiffs was present at said meeting and voted upon each of said propositions.

By reason of such result of said meeting, and the votes taken at such meeting, defendants, when this cause was instituted were purposing to proceed as authorized and directed by Sections 10617, 10618 and 10620 of said Statutes, and they still purpose doing so if not prevented by some cause beyond their control and if they do so bonds will be issued that will be payable out of special taxes charged against all land in said district, including land belonging to each of plaintiffs.

28 Defendants, for further answer, state that, at said meeting of landowners, many of the landowners of said District were present and voted by their attorney or agent, who had written authority to appear for, represent and cast the votes of the land owners they so represented, and the votes cast by such agents or attorneys were counted, and were necessary to make a majority vote for the first proposition so voted on at such meeting.

Defendants, further answering, state that, about the year 1888, a portion of the territory embraced within the boundaries of said district was claimed by some of the inhabitants thereof, to have been incorporated as a village, named The Village of Birmingham, and that about 1889 it became a city of the fourth class, but it never was so incorporated. That about the year 1894, the population of said portion of said territory dwindled to less than one hundred inhabitants, and the remainder thereof have continuously since then, failed to attempt to elect officers or maintain a municipal government or act as such corporation.

That about the year 1889 the inhabitants of a portion of the territory embraced within the boundaries of said district claimed to have been incorporated as the Village of North Kansas City but they were never so incorporated. That about the year 1894, the population of said portion of said territory was less than one hundred inhabitants, and thereafter, and continuously until after said order was made creating said Road District said inhabitants failed to attempt to elect officers or maintain a municipal government.

That the territory so claimed to have been incorporated as Birmingham and the territory so claimed to have been incorporated as the Village of North Kansas City embraced a portion of a public road, that had been such a number of years prior to the alleged incorporation of either said Village of North Kansas City or

29 said Birmingham and had been such ever since then, and which is now the public road within said district that is proposed to be improved.

CLAUDE HARDWICKE,
Attorney for Defendants.

On December 11th, 1912, plaintiffs filed the following reply:

Reply.

Now come plaintiffs and for reply to defendants' answer herein deny each and every allegation of new matter in said answer contained.

SIMRALL & SIMRALL,
CRAVEN & MOORE,
Att'ys for Plaintiffs.

Record Entries.

November Term, 1912. December 11, 1912. Record 45, Page 75.

Now on this 11th day of December, A. D., 1912, and during the November term of said Court come the plaintiffs, by their attorneys, and by leave of court, amend their first amended petition herein as follows:

1. By cancelling the words "City of Randolph" in the 3rd line of the 2nd page thereof, and inserting in lieu thereof, the following words: "Village of North Kansas City."

2. By cancelling the word "Randolph." in the 4th line of the 2nd page thereof, and inserting in lieu thereof, the words "Village of North Kansas City is a village."

3. By cancelling the words "and cities" in the 4th line of the 2nd page thereof, and inserting in lieu thereof, the words "is a city."

4. And by interlining after the word "benefit" in the 11th line of the 4th page thereof, the following words "or the value of plaintiffs' lands."

Now on this 11th day of December A. D. 1912, and during the November term of said court, come the defendants, by their attorney, and by leave of court, amend their answer to the amended petition of the plaintiffs, by adding thereto at the end of the 4th page thereof, the following words to wit: "district including lands belonging to each of plaintiffs."

November Term, 1912. December 11, 1912. Record 45, Page 96.

Now on this 11th day of December, A. D. 1912, and during the November term of said court, this cause coming on for trial, come the parties, by their respective attorneys, and submit said cause to the court upon the pleadings and proof and the trial progressed, and not being finished, it is by the court hereupon ordered that all further proceedings herein be laid over until tomorrow morning.

November Term, 1912. December 12, 1912. Record 45, Page 104.

Now on this 12th day of December A. D. 1912, and during the November term of said court, come the parties, by their respective attorneys and the trial of this cause again progressed, and being

finished, the court announces that it will advise upon the matters in issue herein.

November Term, 1912. December 14, 1912. Record 45, Page 109.

Now on this 14th day of December, A. D. 1912, and during the November term of said court, come the defendants by their attorney, and by leave of court, amend their answer to the amended petition of the plaintiffs by interlineation.

31 *Decree of the Court.*

November Term, 1912. December 14, 1912. Record 45, Page 109.

No. 6827.

W. S. EMBREE, ELLIS GITTINGS, A. N. GITTINGS, C. T. PRITCHARD, S. W. ALLEN, and W. H. ALSTON

v.

THE KANSAS CITY-LIBERTY BOULEVARD ROAD DISTRICT OF CLAY County, Missouri, W. W. Cosby, A. W. Lightburne, and T. J. Ward.

Now on this 14th day of December, A. D. 1912, and during the November term of said court, come the parties, by their respective attorneys, and the court after due consideration of the matters in issue herein, and being now sufficiently advised in the premises, doth find that there is no equity in the petition of the plaintiffs, and thereupon denies the prayer thereof.

Therefore, it is by the court considered, ordered, adjudged and decreed that the petition of the plaintiffs be hereby dismissed, and that the defendants go hence without day and recover of the plaintiffs their costs and charges in this behalf expended and incurred, and have thereof execution.

Filing of Motion for New Trial and in Arrest of Judgment.

November Term, 1912. December 14, 1912. Record 45, Page 110.

Now on this 14th day of December, A. D. 1912, and during the November term of said court, come the plaintiffs, by their attorneys, and by leave of court file thei- motion for a new trial in this cause; and now here come the defendants, by their attorney, and by agreement of said parties, said motion is called up and submitted
32 to the court; and the court having duly heard and considered said motion, doth order that the same be overruled.

Now on this 14th day of December, A. D. 1912, and during the November term of said court, come the plaintiffs by their attorneys, and by leave of court file their motion in arrest of judgment ren-

dered herein, and now here come the defendants, by their attorney and by agreement of said parties, said motion is called up and submitted to the court; and the court having duly heard and considered the said motion, doth order that the same be overruled.

Now on this 14th day of December, A. D. 1912, and during the November term of said court, come the parties by their respective attorneys, and said parties agree and the court consents that the plaintiffs may have any time before, or any time during, the March Term, 1913, of this court to prepare their bill of exceptions in this cause, and within which time, they may pray the judge of this court to allow, sign and seal the same, and in which their said bill of exceptions may be filed herein by them and made a part of the record of said cause.

November Term, 1912. December 14, 1912. Record 45, Page 111.

Now on this 14th day of December, A. D. 1912, and during the November term of said court, come the plaintiffs, by their attorneys, and deposit with the clerk of this court, the docket fee of Ten Dollars, provided by law in cases of appeal, and by leave of court, filed the affidavit of James S. Simrall; and pray for an appeal herein; on consideration of which, it is by the court ordered that said appeal be hereby allowed the plaintiffs to the Supreme Court of the State of Missouri, said affidavit being as follows:

33 In the Circuit Court of Clay County, Missouri, November Term, 1912.

W. S. EMBREE et al., Plaintiff-,
vs.
KANSAS CITY-LIBERTY BOULEVARD ROAD DISTRICT et al., Defendant-.

This affiant James S. Simrall states that the appeal of the plaintiffs in the above entitled cause is not made for vexation or delay, but because the said affiant believes that the said Appellants are aggrieved by the judgment and decision of said court, in said cause.

JAMES S. SIMRALL.

Subscribed and sworn to before the undersigned Clerk of the Circuit Court of Clay County, Missouri, on the 14th day of December, 1912.

Witness my hand and the seal of said Court hereto set, at office, in said County of Clay, this the day and year last above written.

[SEAL.] ANDREW C. HOLT, *Clerk*,
By DAN S. BRADLEY, *Deputy*.

Now on this 14th day of December, A. D. 1912, and during the November term of said court, come the parties, by their respective attorneys, and on motion, the court fixes the amount of the appeal bond to be given herein to the defendants, at the sum of Two hun-

dred dollars, and on application, it is by the court — that the plaintiffs be allowed ten days in the vacation of this court to file such appeal bond, the same to be subject to the approval of the clerk of this court.

In Vacation. December 23, 1912. Record 45, Page 121.

Now on this 23rd day of December, A. D. 1912, and during the November term of said court, come the plaintiffs in the above
34 entitled cause, by their attorneys, before the undersigned clerk of the Circuit Court of Clay County, Missouri, in vacation, and file a recognizance to the defendants in the sum of Two Hundred Dollars, and signed by Shubael W. Allen and Ellis Gittings as principals, and John B. Garth and D. E. Bell, as securities, and conditioned as the law directs in case of appeal and stay of execution,—which recognizance and security are by the said clerk held sufficient and approved.

ANDREW C. HOLT, *Clerk.*

March Term, 1913. March 26, 1913. Record 45, Page —.

Now on this 26th day of March A. D. 1913, and during the March term of said court, come the plaintiffs, by their attorneys, and tender to the court their bill of exceptions in this cause, which, having examined, the court allows, signs and seals, and orders to be filed and made a part of the record herein, which is done accordingly, which said Bill of Exceptions is as follows:

Bill of Exceptions.

W. S. EMBREE et al.
vs.
KANSAS CITY LIBERTY BOULEVARD ROAD DISTRICT et al.

Appearances:

Messrs. Craven & Moore and Simrall & Simrall, Att'ys for Plaintiff.
Mr. Claude Hardwicke, Attorney for Defendant.

Tried at Liberty, Mo.; at the November Term, A. D. 1912, of the Circuit Court of Clay County, Missouri, before his Honor Judge Francis H. Trimble.

35 In the Circuit Court of Clay County, Missouri.

JOSEPH STEPP, Plaintiff,
against
KANSAS CITY LIBERTY BOULEVARD ROAD DISTRICT OF CLAY COUNTY, W. W. COSBY, A. W. LIGHTBURNE, and T. J WARD, Defendants.

Be it remembered, that on this 11th day of December, 1912, at the November term, 1912, of said court, the above entitled cause coming

on to be tried before the Hon. Francis H. Trimble, Judge of said court, the following proceedings were had to wit:

Martin E. Lawson appeared for plaintiff, and Claude Hardwicke for defendants, and it was agreed to by them and consented to by the court that the above entitled cause be submitted to the court on the same evidence introduced in the case of W. S. Embree et al. against the same defendants, tried in this court at this term, said evidence being re-introduced in this case and was and is as follows:

T. C. STEAN being produced, sworn and examined on the part of Plaintiff testified as follows:

Direct examination by Mr. MOORE:

Q. What is your official position?
A. Clerk of the county court.
Q. As Clerk of the County Court have you the petition to incorporate the Kansas City Liberty Boulevard Road District?
A. Yes, sir.

Plaintiff offers in evidence the petition to incorporate.

Q. Can you Mr. Stean turn to your records and find the record of incorporation?

The COURT: What is the purpose?
36 Mr. MOORE: Merely for the purpose of showing the boundary of the district.

Q. Making the preliminary orders for the incorporation of the district?
A. Yes, sir.

Plaintiff offers in evidence the order of the County Court in the matter of A. W. Lightburne, J. H. Rothwell and J. J. Stogdale for the organization of Special Road District in Record W. pages 21, 22 and 23 showing the preliminary incorporation of said dist. which are in words and figures as follows, to wit:—

"Clay County Court, Tuesday, August 8th, 1911. Record W, Pages 21, 22, and 23.

In the Matter of the Application of A. W. LIGHTBURNE, J. H. ROTHWELL, J. J. Sogdale, and Others for the Organization of a Special Road District.

Now on this 8th day of August A. D. 1911, come A. W. Lightburne, J. H. Rothwell, J. J. Stogdale and others petitioners who heretofore to-wit: on the 29th day of June 1911, filed their petition in the office of the Clerk of the County Court of Clay County, Missouri, praying this Court that a public road district, in Clay County, Missouri, be organized under and by virtue of Article VII of Chapter 102 of the Revised Statutes of Missouri, of 1909, and stating that the name of such proposed public road district, is, Kansas City-

Liberty Boulevard Road District of Clay County; that the boundaries of such proposed public road district are as follows:

Beginning at the north west corner of the north east quarter of section numbered eighteen (18) township fifty one (51) range thirty one (31), thence west to the north east corner of the north west quarter of the north west quarter of said section, thence south to the west line of the right of way of the Chicago, Burlington and
37 Quincy Railroad Company, thence in a southwesterly direction following said line of said right of way to the point where said line of said right of way intersects the south line of the north half of the north half of section numbered twenty-five (25) of township fifty one (51) of range thirty two (32) thence west to the east line of the west half of section numbered twenty six (26) of township fifty one (51) of range thirty two (32) thence south to the center of section numbered thirty five (35) of township fifty one (51) of range thirty two (32), thence west to the center of section numbered thirty four (34) of township fifty one (51) of range thirty two (32), thence south to the north east corner of the south east quarter of the north west quarter of section numbered three (3) of township fifty (50) of range thirty two (32), thence west to the east line of the west half of the west half of section numbered four (4) of township fifty (50) of range thirty two (32), thence south to the north bank of the Missouri River, thence easterly following said bank of said river, and the meanderings of said bank to the point where said north bank of said river intersects or comes in contact with, the east line of section numbered thirty one (31) of township fifty one (51) of range thirty one (31), thence north to the north east corner of section numbered eighteen (18) of township fifty one (51) range thirty one (31), thence west to the point of beginning; and stating the number of acres by each signer of said petition, of land within such proposed public road district; the whole number of acres embraced within said proposed public road district, and the names of the owners of land in said proposed public road district, so far as known, and the number of acres owned by each so far as known; and also comes Shubael W. Allen, who, on the 5th day of August 1911, filed his remonstrance and protest against the formation or organization of such proposed public road district; and
also C. T. Pritchard, J. W. Whitaker, Harry Stephens, James
38 Stephens, Ellis Gittings and A. N. Gittings, who on the 7th day of August, 1911, filed their protest and remonstrance against the establishment of said proposed public road district; and it appearing to and being found by the Court that notice of the presentation of said petition, and of the date of the beginning of the next regular term of Court at which the same might be heard, were duly given by the Clerk of this Court in compliance with Article VII of Chapter 102 of the Revised Statutes of Missouri of 1909 said petition and said protests and remonstrances are taken up and heard and considered by the Court on this day it being as soon after the first day of this term of the Court as the business of the Court would permit; and the court after hearing and considering said petition and said protests and remonstrances and all evidence offered in support

thereof; finds that the public good requires and makes necessary the organization, formation and creation of such proposed public road district prayed for by said petitioners and with boundaries as stated in said petition; and that such petition is signed by the owners of a majority of all of the acres of land within said boundaries; and the court orders and adjudges that a public road district in Clay County, Missouri, be and hereby is organized and created under and by virtue of Article VII of Chapter 102, of the Revised Statutes of Missouri of 1909; that the name of such public road district be, Kansas City-Liberty Boulevard Road District of Clay County; and that said public road district be bounded and have boundaries as stated by said petition as hereinbefore stated; and that said public road district be and become, and hereby is a body corporate, and shall possess all powers, privileges and immunities authorized or conferred by law on corporations organized and created under and by virtue of said Article VII of Chapter 102 of the Revised Statutes of Missouri of 1909 or by any acts amendatory thereof.

And the Court doth now here appoint A. W. Lightburne,
39 W. W. Cosby and Thomas J. Ward, each of whom owns land in said district as commissioners of said district, who shall hold their office until the first Tuesday after the first Monday in January 1912, and who, after qualifying as required by law, shall meet at the residence of said A. W. Lightburne in said district, at 10 o'clock A. M. on Tuesday, August 15th, 1911, and organize by electing their president, vice president and secretary as authorized by law.

It is further ordered by the Court that the petitioners herein pay all costs and that execution issue therefor."

The COURT: What is the point of that?
Mr. MOORE: The boundaries.

Q. Mr. Stean are there any other county records, any other orders of record, made by the county court relative to said district?
A. No, sir.

Cross-examination by Mr. HARDWICKE:

Q. You gave notice of the filing of this petition did you not?
A. By publication, yes, sir.

The COURT: I presume that notice is assumed to be regular.
Mr. MOORE: I presume it is, I have no knowledge that it isn't.

40 On the 14th day of December, 1912, the court made its finding and entered judgment for defendants. Thereupon and on the same day, the plaintiffs filed their motion for a new trial of said cause, which motion is in words and figures as follows, towit:

"In the Circuit Court of Clay County, Missouri, November Term, A. D. 1912.

W. S. EMBREE et al., Plaintiffs,
v.
KANSAS CITY-LIBERTY BOULEVARD ROAD DISTRICT et al., Defendants.

Motion for New Trial.

Now come the plaintiffs in the above entitled cause and move the court to set aside its judgment heretofore rendered herein, and grant plaintiff a new trial for the following reasons, towit:

1. Because the court erred in excluding relevant testimony offered by plaintiffs over the objection of defendant.

2. Because the court erred in admitting irrelevant and improper testimony offered by defendant over the objection of plaintiffs.

3rd. Because under the law and evidence, the judgment of the court should have been for the plaintiffs.

4th. Because the court erred in permitting defendants to amend their answer after the cause was submitted to the court for decision.

5th. Because the court erred in permitting defendants to introduce additional testimony in support of the amendments to their answer after the case had been submitted to the court and held under advisement.

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CRAVEN & MOORE AND
SIMRALL & ....LL,
Attorneys for Plaintiffs.

Said motion was on said 14th day of December, 1912, taken up by consent of parties, and was by the court overruled, and to the action of the court in overruling said motion the plaintiff then and there excepted at the time. On said day plaintiffs filed their motion in arrest of judgment, which motion is in words and figures as follows, towit:

"In the Circuit Court of Clay County, Missouri, November Term, A. D. 1912.

"W. S. EMBREE et al., Plaintiffs,
v.
THE KANSAS CITY-LIBERTY BOULEVARD ROAD DISTRICT et al., Defendants.

Motion in Arrest of Judgment.

Now come the plaintiffs, and move the court to arrest the judgment herein, for the reason that on the record alone judgment is for the wrong party.

CRAVEN & MOORE AND
SIMRALL & SIMRALL,
Attorneys for Plaintiffs.

Said motion was on the said 14th day of December, A. D. 1912, taken up by consent of parties and was by the court overruled, and to the action of the court in overruling said motion, the plaintiffs then and there excepted at the time.

And that the above matters and things, rulings and exceptions may be made a part of the record, plaintiffs tender their bill
42 of exceptions and pray that the same may be signed and sealed as such which is accordingly done, this 26th day of March, A. D. 1913.

FRANK P. DIVELBISS,
Judge of the 7th Judicial Circuit of Missouri and ex-officio Judge of the Circuit Court of Clay County, Missouri, Successor to Hon. Francis H. Trimble, Whose Term Has Expired.

This bill is correct.

CRAVEN & MOORE,
SIMRALL & SIMRALL,
Att'ys for Plaintiffs.
CLAUDE HARDWICKE,
Att'y for Defendant.

43 In the Supreme Court of Missouri, in Banc, April Term, 1913.

No. 17450.

W. S. EMBREE et al., Appellants,
v.
THE KANSAS CITY-LIBERTY BOULEVARD ROAD DISTRICT OF CLAY County, Missouri; W. W. Cosby, A. W. Lightburne, and T. J. Ward, as Commissioners of said Road District, Respondents.

Injunction to Restrain the Issuance and Sale of Bonds and the Levy of Special Taxes.

From a Judgment of the Circuit Court of Clay County Dismissing Plaintiffs' Bill for Want of Equity They Appeal.

The plaintiffs are the owners of land situated in the defendant road district, and by a suit in equity seek to restrain said road district and its officers from issuing and selling its bonds in the sum of $70,000 for the purpose of building and improving a public road through said district; and from levying and recording special taxes upon the lands of plaintiff to pay said bonds.

It is contended by plaintiffs that the law under which defendants are threatening to issue and sell said bonds and levy said taxes to meet the same, is unconstitutional; and, therefore, that while said bonds and taxes if issued will be illegal and void, they will, nevertheless, constitute an apparent indebtedness of the district and become a cloud upon the title of plaintiffs' lands.

The law under which the defendants are threatening to proceed is found in Sections 10611 to Section 10625, R. S. 1909, as amended by the laws of 1911, p. 373. To facilitate an understanding
44 of the case, we will first set out a synopsis of the statutes, the validity of which is challenged by plaintiffs. We will italicize those provisions which relate most directly to the issues tendered by the pleadings in the case at bar.

Section 10611, as amended by the laws of 1911, p. 373, authorizes county courts to organize special road districts embracing not less than 640 acres of land, and not more than one municipal township, which district must lie wholly within one county.

Section 10612 provides that said road district shall be tentatively established by county courts upon a petition signed by persons owning more than one half the land in acreage in the proposed districts. Upon the filing of such petition with the Clerk of the county court he must give notice thereof. (No issue is made upon the sufficiency of the notice given in this case.) When the county court convenes all persons having lands within the proposed district who are opposed to its organization may file seperate or joint written remonstrances setting forth specifically their objections to the organization of the proposed district. Said section further provides:

"The court shall hear such petition and remonstrance, *and shall make such change in the boundaries of such proposed district as the public good may require and make necessary*, and if after such changes are made it shall appear to the Court that such petition is signed or in writing consented to by the owners of a majority of all the acres of land within the district as so changed, the court shall make a preliminary order establishing such public road district, and such order shall set out the boundaries of such district as established. If no remonstrance shall have been filed, the Court shall determine whether such petition has been signed by the owners of a majority of the acres of land in the district, and if so, shall establish the district with the boundaries given in the petition, or with such boundaries as may be set forth in an amended petition signed by the owners of a majority of the acres of land affected thereby; and such amended petition may be filed at any time before the making of the preliminery order establishing a road district, but the boundaries of no district shall be so changed as to embrace any land not included in the notice made by the clerk unless the owner thereof shall in writing consent thereto, or shall appear at the hearing, and is notified in open court of such fact and given an opportunity to file or join in a remonstrance."

Section 10613 provides that if the district be established by the court said court shall appoint three commissioners for the district who shall be land owners therein and take the oath required by the cons-itution.
45 Section 10614 requires the commissioners to meet and organize by the election of a president, secretary, etc.

Section 10615 provides that the commissioners shall fix a fair and impartial value upon each tract of land in the district *"independent of the buildings thereon,"* and make a statement thereof showing

the names of the respective persons who own lands within the district, which statements must also show which of said tracts of land lie within one mile, which tracts lie within two miles, and which tracts lie more than two miles from the road proposed to be improved. Said commissioners shall then cause to be made by the county surveyor or bridge commissioner estimates and specifications of the cost of any road improvements they may desire within the district, as well as estimates of the amount or proportion of such costs to be taxed against each tract of land in the district. Said Section further provided that:

"*Each tract of land within one mile of any road to be improved shall, in the making up of such estimate be charged in proportion to the valuations fixed thereon as above directed,* and each tract at a greater distance than one mile and less than two miles from any such road in proportion to *seventy-five* per cent of such valuations, and each tract at a greater distance than two miles from said road in proportion to *fifty* per cent of such valuation; and in determining the share of any tax bill or bond any tract of land in said district should *be* bear, the county clerk shall be guided by the same rule of apportionment. Said tabulated statement of valuations, and said engineer's estimates and apportionment, together with maps and profiles when made to the satisfaction of said commission, shall be filed with the president or secretary, and shall from the date of their filing be open to the inspection, under proper regulations, of all owners of land within the district."

Section 10616, as amended by laws 1911, pp. 373-374, is as follows:

"Upon the filing of said tabulated statement of valuations and said report, maps and profiles, the board of commissioners shall call a general meeting of the landowners of said district at some convenient place therein, and shall give at least twenty days' notice of the time and place of such meeting and the purpose thereof, by at least ten printed or written handbills put up in public places therein and by at least three publications in a weekly newspaper published in said county. At such meeting the board of Commissioners shall submit the report containing the estimates, together with the maps and profiles, made by the engineer, to the landowners for examination and explanation, and shall take a *viva voce* vote of the landowners present on the following propositions:

First. Shall the roads mentioned in said report be constructed or improved according to any of the plans and out of any of the materials therein set out and the cost thereof charged against the lands in said district?

Second. What materials shall be used in constructing or improving said road or roads?

Third. Shall the cost be paid (1) at once, or (2) fixed and determined a number of years, not to exceed twenty, through
46 which such costs shall be distributed.

Each landowner shall have as many votes, on every proposition, as he owns acres of land in the district. For a determination of the First proposition in the affirmative *the vote of the owners of*

a majority of the acres of land in the district shall be necessary; for a determination of the second and third propositions what materials shall be used, and that term of payment be decided upon which received the *affirmative vote of a majority of the acres of land represented by landowners present and voting.* In determining the first proposition the landowners may determine by one vote to construct or improve all the roads proposed by the commissioners for construction or improvement, or may vote for each road seperately."

Section 10617 provides that if at such a meeting of landowners the persons owning a majority of the land in acreage in such district shall vote in favor of the proposition to construct or improve any road or roads therein in accordance with the plans, estimates and specifications of the officers making such survey and estimate, the commissioners shall make out, file and acknowledge a report of the action of said landowners at said meeting and file the same with the clerk of the county court, who shall enter the same upon the records of his court, *and thereafter said road district shall become a political subdivision of the State* with such powers as are now given to it, or may, from time to time, be given to it by law. Said section further provides that:

"If, however, the owners of a majority of the acres of land in said district do not vote to construct or improve any of the roads proposed by said commissioners and to charge the lands therein with the cost thereof, then said commissioners shall so report to the county court, *and the court shall make an order rescinding its former preliminery order establishing* said road district."

Section 10618 provides merely for the letting of the contract for the improvements voted by the meeting of landowners.

Section 10619 provides for issuing tax bills against the land in said special road district and delivering the same to the contractor in cases where all the improvements are to be paid for in one assessment or in one year. However, the facts in this case do not involve the construction of this section.

Section 10620, as amended by laws of 1911, pp. 374-375-376, provides that:

"When the landowners, in general meeting as prescribed in Section 10616, shall direct that the costs of the construction of improving any road shall be distributed through a number of years not to exceed twenty, and shall fix and determine such number, the board of commissioners shall issue the bonds of the road district for
47 the length of time by said meeting directed, and in an amount not to exceed the estimates submitted to said meeting plus ten per cent thereof, and enter into a contract for the construction of said road as directed in Section 10618 and 10619 of this Article, except that said contract shall provide for a payment of said work in money instead of special tax bills; *Provided, that said commission may use said bonds or any part thereof at par in payment for said work. Said bonds shall run in the name of said road district* and shall bear not to exceed six per cent interest, and shall be payable at the end of the time indicated by the landowners at their general meeting, and shall contain a provision that they may be

paid by number at any time after one year on the call of said board of commissioners filed with the county clerk. Said bonds shall be signed by the president of said road district and attested by the county clerk, who shall before the delivery thereof, register the same in a suitable book for that purpose. Whenever the Board of Commissioners shall sell any bonds for any work to be performed under this article, the money paid therefore shall be paid to the county treasurer who shall enter the same to the credit of the said road district and shall be responsible on his bond for the faithful keeping thereof, and shall pay the same out on warrants by said board of commissioners. The Board of Commissioners shall make out and certify to the county clerk a statement of the amount of the bond issue, and a description by number of each tract of land in said district lying within a distance of one mile of the road to be improved, and of each tract at a greater distance than one mile and less than two miles, and of each tract of a greater distance than two miles, and the number of acres in each tract, and the valuation placed thereon by them, and acknowledge said certificate in the way that conveyances are required by law to be acknowledged, and file the same with the county clerk. The county clerk shall thereupon apportion to each tract, according to the rule prescribed by Section 10615, its share of said bond issue, principle and interest, stating each seperately, the interest being the amount necessary to pay the interest on the bonds as it annually becomes due, and shall enter the same in a book to be denominated 'bond tax record of * * * road district,' and shall append his certificate thereto as county clerk, *and from said date such apportionment shall be a charge against the tracts of land indicated until paid.* The county clerk shall on each successive year make out a duplicate of so much of said bond record as will indicate the portion of said charge each tract is to pay for that year, principle and interest, and deposit said duplicate record with the collector of the revenue of the county or with the collector of revenue of the township of townships in which the road district may lie according as such county may or may not be under township organization, and said collector *shall annually make out seperate tax bills against each tract of land for the amount shown by the duplicate book deposited with him to be due and collect the same as he collects direct taxes levied for any governmental purpose, and in the same manner receipt for the same.* Said tax bill shall contain the name of the person shown by the records to be the owner thereof, and if not paid on presentation shall bear one per cent interest from the first day of the following January for each month the same remains unpaid, and if not paid within six months of said date *may be recovered by a suit brought to the use of the collector of the revenues of the county,* and in such suits the same commissions shall be allowed to the tax attorney of the county as are allowed for bringing suits for the collection of delinquent taxes, and such suits may be brought as such suits for taxes may by law be brought, and in such cases the tax bill shall be *prima facie* right of the plaintiff to recover. A judgment in such suit shall be made a lien on the land described in the tax bill, and a sale thereunder shall carry all the title and

interest in said lands of every person who has according to law been made a party defendant to such suit. The collector shall deposit all moneys by him collected on said tax bills with the county treasurer within one month after having collected the same, and shall in all cases be charg-able on his bond for the faithful performance of his duty, both in collecting said tax bills and in depositing the money collected, and upon his failure to perform his duties in said
48 regard it shall be the duty of said board of commissioners to cause suit to be brought against him on his bond in the name of the state of Missouri to the use of said district. The collector shall receive the same fees for collecting such tax bills that he is allowed by law for collecting taxes against real estate, to be retained by him out of the money so collected. The collector shall issue a receipt to the owner of the land paying any such tax bill, and on presentation of any such receipted tax bill to the county clerk, *the clerk shall mark the tract of land against which the same was charged discharged therefrom,* and the collector shall in like manner in the duplicate of the record in his possession enter such discharge whenever he collects the money due on any such tax bill."

The remainder of said section pertains to the matter of paying the bonds out of money arising from the aforesaid special assessments. No provision is made for paying the bonds except out of the proceeds of the special tax bills authorized by this section.

Section 10621 merely prescribes a rule for determining who are the owners of land within the district and provides that owners may be represented at elections or general meetings of land owners by agent or attorney who may vote for such owners.

Section 10622 provides for additional elections to determine whether other roads shall be constructed or improved in the district. Such meetings to be called by the commissioners upon the petition of the owners of a majority of acres of land in the district.

Section 10623 merely provides for the employment of the county surveyor or bridge commissioner to make estimates, specifications, etc.

Section 10624 provides that general road taxes levied on "property" in the district under existing law, as well as license taxes, poll taxes and *city revenue* raised and set aside for special road districts under the provisions of Article 6, Chapter 102 of the Revised Statutes of 1909 shall be paid over to the commissioners, to be used by them in improving roads, employing engineers, etc.

Section 10625, as amended by the Laws of 1911, p. 376, does not affect any issue in this case. It only prescribes a rule for determining how far lands in the district are situated from roads to be improved.

49 The pleadings and evidence in this case show that upon the petition of the persons owning a majority in acreage of land in the defendant road district the county court of Clay County ordered that said road district be incorporated as a public road district under the name of "The Kansas City-Liberty Boulevard Road district of Clay County, Missouri," and thereupon appointed de-

fendants, Lightburne, Cosby and Ward, as commissioners of the district.

At a meeting of the land owners of defendant road district, held July 15, 1912, pursuant to section 10616 R. S. 1909, the persons owning a majority of land in said district (such land owners being allowed one vote for each acre of land owned by them) voted to bond the district for $70,000, and ordered a levy of special taxes upon all the lands in the district to pay such bonds.

Upon the filing of the report of said land owners with the clerk of the county court of Clay County that court adjudged and declared the defendant road district to be a body corporate and a political subdivision of the State, as provided by section 10617, R. S. 1909.

Plaintiffs challenge the constitutionality of the law hereinbefore set out on the following grounds:

Issues.

(1) That it violates section 12 of article 10 Constitution of Missouri by authorizing the issuance of bonds without the approval of two-thirds of the qualified voters of the road district.

(2) That it further violates said section 12 of article 10 by authorizing the issuance of bonds in excess of five per cent of the assessed valuation of the property in the district.

(3) That it violates section 3 of article 10 of the Constitution of Missouri, in that the tax which it authorizes to be levied is
50 not uniform upon the same class of subjects within the territorial limits of the authority levying the same.

(4) That it violates section 4 of article 10 constitution of Missouri, in that it does not require property within the district to be taxed according to its value.

(5) That the levy of taxes provided for in said law is an attempt to take the property of plaintiffs without due process of law, as prohibited by section 30 of article 2 of the Constitution of Missouri and the Fourteenth amendment to the Constitution of the United States.

Opinion.

Plaintiff's first and second objections to the law under which defendants are attempting to issue and sell bonds of the road district may properly be considered together. Unless those bonds are based solely upon the special tax levy voted by the land owners of the district they will doubtless be void when issued, because their issue was not authorized by two-thirds of the qualified voters of said road district at an election held for that purpose; and for the further reason that the aggregate amount of said bonds will exceed five per cent of the value of the taxable property of the district, as prohibited by section 12 of Article 10 of the Constitution of Missouri.

The general scope and purpose of the law under which defendants purpose to issue bonds of the district indicates that said bonds should be paid exclusively from money arising from the levy and collec-

tion of special taxes voted at the land owners' meeting before mentioned, but the law does not direct that said bonds shall be paid solely from that fund. It does provide that such bonds *shall run in the name of the road district.* Section 10620, R. S. 1909, as
51 amended by Laws of 1911, p. 374. When issued in conformity with that law said bonds will apparently represent a general debt of the district, payable out of any funds the district may have on hand when they become due. So that while such bonds in fact can only be paid out of the special taxes levied upon lands of the district in conformity with Section 10620, supra, they will, in form at least, represent a general obligation of the district, and will tend to cast a cloud upon the title of plaintiffs' land and produce vexatious litigation. (Richardson v. McReynolds, 114 Mo., 641.) It follows that upon the first two issues tendered by plaintiffs we must hold that they are entitled to an injunction restraining the issuance and sale of bonds purporting to be a general debt of the district as threatened by defendants.

If the law under which defendants are proceeding was otherwise constitutional and the proposed bonds contained a recital of the law under which defendants seek to issue them, and also a recital that said bonds when issued are to be paid solely from moneys to be derived from special taxes voted at the meeting of land owners held on July 15th, 1912, the issue would be quite different, but it is not necessary to determine what our ruling would be upon a different state of facts.

II.

The third and fourth issues tendered by plaintiffs will likewise be considered together. The third ground urged against the constitutionality of the law is that it does not provide for a uniform tax upon the same class of subjects, and, therefore, violates section 3 of article 10 of the constitution of Missouri. This insistence must re-
52 ceive very careful consideration in view of the fact that one part of the law in judgement (Section 10615, R. S. 1909) provides that the commissioners in fixing a "fair and impartial valuation" upon the lands of the district for the purpose of levying the special taxes therein authorized shall ascertain the valuation of said lands, "independent of the buildings, thereon."

It is a settled rule of law that buildings placed on land by the owner thereof are part of the land, (Washburn on Real Property, Vol. I, 6th Ed., p. 3) just as much as fruit trees or timber growing thereon. (Mine La Motte Lead and Smelting Co. v. White, 106 Mo. App., 222).

Therefore, it is difficult to see how in fixing a "fair and impartial valuation" upon lands it is possible to exclude one class of improvements and include another. For instance, if one of the land owners in defendant road district by his labor and expenditures has built thereon a house worth $5,000, and thereby increased the value of his land to that extent, and another person having lands in said road district has built no house, but, through his industry and expenditure of money, has planted and grown thereon an orchard or

vineyard of such magnitude as to increase the value of his property to the extent of $5,000; upon what theory can a "fair valuation" be placed upon each tract of land by excluding the value of the building on one tract, and including the value of the orchard or vineyard on the other? This question answers itself, and marks the law in judgment as a deliberate attempt to promote unequal taxation.

If a city having the power to levy a license tax on pharmacists should levy a tax of $5.00 on thos- pharmacists graduated from one school, and a similar tax of $10,000 on pharmacists graduated from other schools, the ordinance levying such tax would not be any more obnoxious to the constitution than the law which we
53 are now construing.

It is true that this Court has held that special taxes for local improvements are not governed by sections 3 and II of article 10 of our Constitution. Notwithstanding the provision in said Section II that the restrictions therein as to the rates of taxation "shall apply to the taxes of every kind and description whether general or special." * * * Garrett vs. St. Louis, 25 Mo., 505; Farrar vs. St. Louis, 80 Mo., 379; St. Joseph vs. Owen, 110 Mo., 445; Meier vs. St. Louis, 180 Mo. 391; and Corrigan et al., vs. Kansas City, 211 Mo., 608. In a broad general sense the doctrine announced in these cases is correct.

In the case last named it was held by a majority of the Judges of this Court that the charter of Kansas City which authorized the levy of a special tax upon lands for the maintenance of a city park was not unconstitutional because it directed the taxing power in placing a valuation upon lands for the purpose of levying said special tax to disregard all improvements on such lands; and further provided that all lands should be exempt from such special tax which were not on the assessor's books for general taxation, thus exempting lands owned by churches, schools and railroads.

The law now under consideration is very unlike the above mentioned charter of Kansas City which was in judgment in the Corrigan case. There the charter provided for exempting from the special tax all improvements on lands within the park district, while in this case said section 10615 directs that only one class of improvements (buildings) shall be exempted.

The writer has no quarrel with the rule of law announced by the majority opinion in the Corrigan case. It is not necessary to
54 overrule that case in order to reach a correct decision in this case, but, in passing, I take the liberty to observe that the Corrigan case travels a long distance in the way of approving a basis of taxation which is of doubtful validity; and which, in fact went so far along that line that three of the learned Judges of this Court filed a vigorous dissent to the conclusions reached by the majority of their brethren.

Not only does section 3 of article 10, supra, but several other provisions of our constitution breathe a command that unequal and unjust taxes shall not be imposed. Section 4 of article 10 requires that "all property subject to taxation shall be taxed in proportion to its value." Section I of article 14 of our Constitution also prohibits

the taxation of property of non-residents at a higher rate than the property of citizens of this State.

In the case of State vs. Whipple, 136 Mo., 475 we held that a poll tax levied only on male persons who neglect to cast their votes at general elections was invalid because not uniform it its operation upon the same class of voters. An ordinance of the City of St. Louis levying a license tax of $25.00 on meat shops in one part of the City, and $10.00 on such meat shops if located in another part of the city, was likewise held unconstitutional. City of St. Louis vs. Spiegel, 75 Mo., 145. So it will be seen that we have applied the spirit of the Constitution in construing revenue laws not pertaining to general taxes, and this rule should be observed whenever practicable.

It is true that special taxes for local improvements, in the very nature of things, cannot always be fair and uniform. However, we cannot bring ourselves to believe that the General Assembly, or any other taxing power in the state, can deliberately adopt an unfair method of raising money for a public or semi-public purpose such as the construction of public highways.

55 When a law is intended to provide a fair system of levying and collecting general or special taxes, it should not be condemned by the courts because in rare and unusual cases it produces inequitable results; but the law we are now called upon to construe contains, in its very words, a command which, if obeyed, is bound to produce inequality and injustice in almost every instance. Therefore, we hold that the defendant should be enjoined from issuing and selling bonds or levying taxes under its provisions.

III.

Due Process of Law.

The fifth contention of plaintiffs that the statute under which defendants are acting violates the due process of law clauses of the State and Federal Constitutions strikes at two separate provisions of said statute which will be considered separately in this and subsequent paragraphs.

Right to Remonstrate.

Section 10612, R. S. 1909, provides for a hearing on the petition of land owners before any preliminary or tentative order is made by the county court for the establishment of the district. At this hearing persons having lands within the proposed road district may protest, but there is no ground or reason named in the law whereby any lands may be excluded from the proposed district which will not be benefited by the construction or improvement of roads therein. This law merely provides that such tracts may be excluded "as the public good may require and make necessary." After such exclusions have been made, if it appears to the county court that persons

owning a majority of the acres in the proposed district have
56 signed the petition or consented in writing, the preliminary order establishing the district should be made.

This statute seems to have been cunningly devised to discourage remonstrances by persons whose lands have been wrongfully included in the proposed road district. Why grant a man the right to remonstrate against the wrongful acts of his neighbors, and in the same breath tell the officers who must pass upon his remonstrance that the same must be overruled? It is apparent that if the letter of this law be followed by county courts then remonstrances against the wrongful inclusion of lands in road districts will be a useless formality.

However, in construing statutes we are required to resolve every doubt in favor of their validity and indulge every reasonable presumption that they were enacted to accomplish some practical and useful purpose. (State ex rel. v. Pike County, 144 Mo., 275; Bingham vs. Birmingham, 103 Mo., 345 and State v. Fawcett 212 Mo., 729.) Therefore, we hold that the General Assembly in granting to land owners of a proposed road district the privilege of being heard by remonstrance intended that such land owners should have the right in such remonstrance to urge against the organization of the district or the inclusion of their lands therein any statutory or constitutional grounds which such land owners may possess; and that if such grounds be valid the Court may exclude the lands of the remonstrators or refuse to incorporate the proposed district. This ruling is rendered necessary to avoid the conclusion that the General Assembly directed a hearing without intending that any relief might thereby be obtained.

57 IV.

Appraisement of Lands—Levy of Taxes.

Respondents admit that the law now under consideration contains no provision granting to land owners the right to be heard before any officer or person on the correctness or fairness of the appraisement of their lands before the levy of the special road tax. Respondents, however, insist that the failure to give land owners a hearing on the correctness of the appraisement of their lands is not a denial of due process of law, for the reason that plaintiffs when sued for the special taxes to be levied upon their lands may plead any statutory or constitutional objection they may have against the validity of such taxes.

In support of this insistence defendants cite Saxton National Bank vs. Carswell, 126 Mo., 445; and Hager vs. Reclamation District, 111 U. S. 701. The last named decision of the Supreme Court of the United States seems to sustain defendants' contention on this point, but Saxton National Bank vs. Carswell, supra, does not. In the Saxton case the law there construed guaranteed to the defendant the right to defend against the special taxes on certain specified grounds, while the law we are now considering does not purport to grant to

land owners the right to make any objection when sued for the special taxes levied against their land without notice.

In the very recent case of Londoner, et al., vs. The City of Denver, 210 U. S. 373, it was held that when land owners were given only a right to file a written remonstrance against special taxes levied upon their lands with no right to be heard orally or to introduce evidence showing the unjustness of such proposed levy, then such taxes were void because the land owners were denied the due process of law guaranteed by the Fourteenth Amendment to the Constitu-
58 tion of the United States. From the phraseology of the Londoner case it would seem that the failure to provide a full hearing would invalidate the law, but it will be observed that in said case the laws of Colorado permit a sale of lands for the special tax without the formality of a suit; so that case is not necessarily in conflict with Hager vs. Reclamation District, supra.

V.

Sale Without Suit.

The taxes which defendants are threatening to levy upon the lands of plaintiffs will be invalid for another reason embraced in plaintiffs' fifth contention and closely related to the point discussed in paragraph IV. Said section 10620, as amended by the Laws of 1911, pp. 374 and 375, in addition to a suit against the land of plaintiffs to collect the special taxes which the defendants are threatening to levy thereon, also provides that the tax bills for such special taxes shall be collected by the collector *"the same as he collects direct taxes levied for any governmental purpose"*. This language clearly empowers tax collectors to seize and sell the personal property of plaintiffs for such special taxes as may be levied under this law by respondents without a suit of any kind, the same as they may seize and sell personal property for state and county taxes due on real estate under the power conferred by sections 11461 and 11464, R. S. 1909. (State ex rel. vs. Snyder, 139 Mo., 549.) If this statute had provided for the sale of plaintiffs' lands without a suit, it would fall directly under the rule announced by the Supreme Court of the United States in the Londoner case, supra. And as it does provide for the seizure and sale of personal property of plaintiffs for the special taxes without any formal suit, it must be held to authorize the taking of private property without due process
59 of law, as prohibited by both our State and Federal Constitutions.

VI.

Exclusive Privilege—Equal Protection of the Law.

In construing the law now under consideration this court takes judicial notice that the value of lands are usually enhanced by the construction of good roads adjacent thereto, and it would not be inequitable to levy special taxes upon such lands to defray part of

the expense of constructing and improving such public roads. This law is not obnoxious to the construction because it attempts to accomplish that result.

We also take judicial notice of the further fact that persons who do not own any lands are often vitally interested in the construction and repair of public highways, and it is difficult to understand how the control of public highways can be exclusively committed to landowners without violating paragraph 26, section 53, article 4 of the Constitution of Missouri, prohibiting the granting to any individual of exclusive rights or *privileges*. It is also difficult to see how the non-land-owning portion of the inhabitants of a road district can be denied a voice in regulating the matter of public highways therein without violating section I of the Fourteenth Amendment to the Constitution of the United States, which prohibits the states from denying to any citizen of the United States the equal protection of the laws. However, what we have said in this paragraph is outside the issues in this case and should be treated only as obiter. We were constrained to make these observations because several attempts have been made to enact a law of the same character as the one now in judgment.

60 In this case we hold that as the bonds which defendants are threatening to issue will, if issued, be void, and the special taxes to pay said bonds which defendants are also threatening to levy and record against plaintiffs' lands will, if levied and recorded, be invalid and cast a cloud upon the title to plaintiffs' lands, therefore the judgement of the trial court dismissing plaintiffs' petition for want of equity should be reversed and remanded with directions to enter a judgement in favor of plaintiffs in accordance with the prayer of their petition. It is so ordered.

Lamm C. J. and Farris J., concur, Walker and Graves, J.J. concur in separate opinion filed by Walker J. Woodson J. also concurs in separate opinion filed and Bond J. concurs in result.

JOHN C. BROWN, *Judge*.

61 *Opinion.*

In the Supreme Court of Missouri, in Banc, April Term, 1913.

No. 17450.

W. S. EMBREE et al., Appellants,
v.
THE KANSAS CITY-LIBERTY BOULEVARD ROAD DISTRICT OF CLAY County, Missouri; W. W. Cosby, A. W. Lightburne, and T. J. Ward, as Commissioners of said Road District, Respondents.

Concurring Opinion of Walker, J.

I concur in the result reached in the majority opinion, but desire to state my reasons for holding article 7 of chapter 102, R. S. 1909, as amended by Laws of Missouri, 1911, p. 373, within the restrictive

limitations of the State Constitution in regard to the rates of taxation, and therefore invalid.

Section 10620 of said article and chapter, as amended by section 3, Laws of Missouri, 1911, p. 375, provides among other things: "The county clerk shall on each successive year make a duplicate of so much of said bond record as will indicate the portion of said charge each tract is to pay for that year, principal and interest, and deposit said duplicate record with the collector of the revenue of the county or with the collector of revenue of the township or townships in which the road district may lie according to such county may or may not be under township organization, and said collector shall annually make out separate tax bills against each tract of land for the amount shown by the duplicate book deposited with him to be due and *collect the same as he collects direct taxes levied for any governmental purpose*, and in the same manner receipt for the same."

62 The italics indicate the portion of the above quotation to which we will particularly refer in discussing the statute.

Briefly, what is meant by authorizing the collector "to collect same" (referring to the tax bills) "as he collects direct taxes levied for any governmental purpose?" An answer is readily found to this inquiry in the statute in relation to the collection of direct taxes, which provides: "The collector- shall diligently endeavor and use all lawful means to collect all taxes which they are required to collect in their respective counties, and to that end they shall have the power to seize and sell the goods and chattels of the person liable for taxes, in the same manner as goods and chattels are or may be required to be seized and sold under executions issued on judgments at law, and no property whatever shall be exempt from seizure and sale for taxes due on lands or personal property." (Part of section 11461, R. S. Mo. 1909.)

The proviso following the general power conferred by said section 11461 not being pertinent, their consideration is not necessary here.

Applying this statute to the special tax bills as expressly authorized by section 10620 as amended, supra, the collector, instead of being limited in the collection of said tax bills to the tracts of lands benefited or, within what is usually termed in special assessments, the taxing district, is authorized to enforce their collection by the seizure and sale of any property of the landowner as such property may be seized and sold under executions issued on judgments at law. Construed otherwise, the power thus conferred on the collector means nothing, because the remainder of the statute provides definitely the course to be pursued when such tax bills are enforced against the lands alone.

63 If, therefore, as we contend, section 10620, as amended, empowers the collector to seize and sell the general property, if he may so determine to do, of the landowner in the special road district to satisfy said tax bills instead of confining his power to the seizure and sale of the land itself, then the character of such tax bills as special assessments is destroyed and the rate of taxation thereunder becomes subject to the constitutional limitations as defined in sections eleven and twenty-two of article ten (Con. Mo.),

and being in excess of same, are unauthorized and void. "Special assessments," as defined by Desty and other writers on taxation (2 Desty Taxation, Sec. 177, p. 1234) "are assessments imposed on property especially benefited by an improvement, to pay the expenses of which the special tax is levied." Our own court, speaking through Graves, J., in Union Trust Co. v. Pagenstecher (221 Mo. l. c. 128), says. "Special assessments have for their basis special benefits and apply to real property alone and not to personal property." The learned judge further commenting upon this character of assessments, quotes with approval the definition of same to be found in 25 Am. & Eng. Ency. Law, 2nd Ed., 1168, as follows: "A special or local assessment is a burden imposed by law upon real property for a public improvement, the extent of the burden being determined by the special benefits which inure to the assessed property by reason of the improvement."

One of the distinguishing features of a special assessment is, therefore, that it shall be *imposed on the property especially benefited;* if not so imposed, does it not follow as an inevitable conclusion that it becomes general, and therefore subject to the constitutional limitation in regard to the rates of taxation?

64 This seems to be the well-defined trend of the reasoning of our court in numerous cases.

In other words a tax is general when all property may be made subject to its payment, and it is special when it may be collected only out of the property benefited by its imposition. Leonard, J., speaking for the court in Newby v. Platte County (25 Mo. l. c. 269), in holding a road law constitutional, said: "That the property is assessed in respect to the benefit derived from the improvement; it is a tax on the benefits rather than a tax on property, and therefore not obnoxious to the constitutional requirement that all property subject to taxation shall be taxed according to its value. There is a marked difference between general taxation and special assessments for local objects, and the word tax may be used in a contract or statute so as not to embrace within its meaning local or special taxes, although both kinds of taxation derive their authority from the general taxing power."

In Farrar v. St. Louis (80 Mo. 379), Norton, J., elaborately reviews the cases on this subject, and the cogent reasoning of the opinion in distinguishing general from special taxes is that in the latter the property itself is held liable for the improvements made thereon, which renders the bill an assessment for improvements and not a burden, while in the former the tax constitutes a general burden. Like reasoning defining the distinction between general and special taxes is to be found in subsequent cases, notably that of Smith v. Kiene, 231 Mo. 227, by Woodson, J.

It is well established that a personal judgment cannot be rendered against the owner of property on account of special assessments

65 (St. Louis v. Allen, 53 Mo. 44; St. Louis v. Wright Con. Co., 202 Mo. l. c. 469; 2 Desty Taxation, p. 1355). This being true, it is consonant with the theory that the tax bills authorized by the statute in question may reasonably be construed as spe-

cial assessments when they may, if the collector so determine, be satisfied in the same manner as general tax bills. Such a conclusion would involve an absurdity in this, that while general judgments cannot be rendered on special tax bills, such bills may be enforced against any character of property as are general executions upon judgments at law.

We are therefore of the opinion, as was said by Adams, J., in State ex rel. Chouteau v. Leffingwell (54 Mo. 458), that "local assessments are constitutional only when they are imposed to pay for local improvements conferring local benefits," and that the statute (article 7, chapter 102, R. S. 1909), which authorizes a collector under the guise of a special assessment to levy on any property of the owner to satisfy same is within the restrictive limitations of the Constitution in regard to the rates of taxation, and is therefore void.

Graves, J., concurs in the views herein expressed.

(Signed) R. F. WALKER, *J.*

Concurring Opinion by Woodson, J.

I concur in the result reached in this case for the reason that in my opinion the principle involved herein is precisely alike, instead of unlike as the majority opinion holds, the one involved in the case of Corrigan et al. v. Kansas City, 211 Mo. 608, and for the reasons stated in my dissenting opinion in that case I concur in the result reached in this.

In passing, I wish to add that I am unable to see upon
66 principle of law it can be logically contended that an exemption of the improvement upon the land from taxation in this case can differentiate it from the Corrigan case, where it exempted not only the improvements but the land also upon which the improvements stood. So I suppose that if the statute now under consideration had exempted from taxation not only the improvements upon the land situate in the road district here involved, but had exempted both the land and the improvements, as was done in the Corrigan case, the majority opinion in this case would have held that this statute was not obnoxious to that provision of the Constitution which provides that taxation shall be uniform, etc.

This reasoning, in my opinion, is just as logical as was that used in reaching the conclusion announced in the case of Honea v. St. Louis & Iron Mountain Railway Co., 153 S. W. Rep. 486.

I express no opinion upon any other question discussed in the opinion.

(Signed) A. M. WOODSON, *Judge.*

67 In the Supreme Court of Missouri, in Banc.

And thereafter, to-wit, on December 24th, 1913, the following further proceedings were had in said cause:

17450.

"W. S. EMBREE et al., Appellants,
vs.
KANSAS CITY & LIBERTY B'L'V'D ROAD DISTRICT et al., Respondent.

Now at this day, the Court having considered and fully understood the motion of the said Respondents for a rehearing herein, doth order that said motion be sustained, and that the said cause be set for the January Call, 1914, in the Court in Banc."

68 In the Supreme Court of Missouri, October Term, 1913, in Banc.

(No. 17450.)

W. S. EMBREE et al., Appellant,
v.
KANSAS CITY & LIBERTY BOULEVARD ROAD DISTRICT et al., Respondents.

Statement.

The plaintiffs instituted this suit in the Circuit Court of Clay County, against the defendants to enjoin them from issuing $77,000, of bonds, the proceeds of which were to be used in the construction of public high-ways in The Kansas City-Liberty Boulevard Road District, of Clay County, Missouri.

A trial was had which resulted in a judgment in favor of the defendants, and a dismissal of the bill.

After taking the proper preliminary steps therefor, the plaintiffs appealed the cause to this Court.

The facts of the case are practically undisputed, and are as follows:

The Kansas City-Liberty Boulevard Road District of Clay County is a special road district, organized and incorporated under Article 7 of Chapter 102, R. S. 1909, and the amendments thereto.

There is no pretense but what the district was duly incorporated under the provisions of said article, but the contention is that the article is unconstitutional, null and void under both the State and Federal Constitutions.

In order to intelligently understand the legal propositions here presented, it is necessary to briefly notice the provisions of said Article 7.

69 The first section thereof, being 10611, R. S. 1909, provides that the county courts of the various counties of the State may divide them into road districts, and authorizes said courts to incorporate with the usual powers of corporations for public purposes, and each to be known as "— road district of — county." Each district to embrace not less than two thousand acres of con-

tiguous lands, and may be commensurate with a township, but must be located wholly within the county in which it is organized.

Section 10612, provides that when a petition signed by the owners of a majority of the acres of land within any district proposed to be organized, stating the name of the proposed district, giving the boundaries thereof, and the number of acres embraced, and stating the names of the owners of the land, and the number of acres owned by each, and praying for an origination of such public road district in accordance with the provisions of said article and filed in the office of the clerk of the county court thirty days before the first day of the next term thereof, the clerk shall give notice that the petition will be heard at the next term of the court, etc., which shall state the names of at least three of the petitioners and the boundaries of the proposed district, and notify all owners of the land in said district who may desire to oppose the formation thereof to appear on the first day of said term and file their written remonstrance thereto, etc., which shall specifically state their objections to said organization. That the court shall hear said remonstrance, and may make such changes in the boundaries of such district as the public good may require. That if after such changes have been made it appears to the court that the petition so filed still contains the names of the owners of a majority of the acres contained in the district, the court shall make a preliminary order establishing the district, and set out the boundaries
70 thereof. If no remonstrance shall have been filed, the court shall determine whether the petition for the organization has been signed by the owners of a majority of the acres embraced within the proposed district, and if so, shall establish the district with the boundaries given in the petition, or with the boundaries as may be set forth in the amended petition signed by the owners of a majority of the acres affected thereby; and said amended petition may be filed at any time before the preliminary order establishing the district is made, but the boundaries of the district shall not be changed so as to embrace any lands not described in the notice given by the clerk, unless the owner shall in writing consent thereto, etc.

Section 10613, provides that after the district has been formed the county court shall appoint three commissioners, possessing certain qualifications, to hold their office until the first Tuesday after the first Monday in January thereafter; "and on said last date the land-owners in the district shall elect three commissioners, one to hold office for one year, one for two years and one for three years, and on the first Tuesday after the first Monday in January of each year thereafter, they shall elect one commissioner for a period of three years," etc. Then follows provisions for filling vacancies on the commission etc.

Section 10614 provides for the qualification of the commissioners, organization of the board, the election of officers, and the times and places for holding meetings, etc.

The County Treasurer is made treasurer of the road district, etc. That the president of the Board of Commissioners shall preside at

all meetings, sign warrants and have general supervision over the work of the commission, etc., and the secretary shall keep a record of all the proceedings of the board, draw warrants, etc.

71 Section 10615, provides that the Board of Commissioners shall fix a fair and impartial value on each tract of land within the district independent of the buildings thereon, and make a tabulated statement of such valuations, according to numbers, and the names of the owners if known, etc., and note what tracts lie within one mile of the road proposed to be improved, those that are a greater distance than one and under two miles, and those over two miles, and when more than one road is proposed to be improved a separate statement as to each shall be made. The statements of valuations shall be signed by the commissioners and acknowledged etc. Thereupon the board shall request the County Surveyor to draw estimates of the costs of the road to be improved, etc., who, under the direction of the board shall make estimates of the various costs of the improvements, etc., and make a report to the board accompanied by maps and profiles, specifying the road or roads to be improved, and the various kinds of work and materials to be used, etc., and the proportionate cost to be charged to each separate tract of land for each separate road, and for the whole, according to the valuations previously made, if all are to be paid for at once, and the amount if to be paid in five or twenty years equal installments, and the amount of each installment. That each tract of land within one mile of the road to be improved shall be charged in proportion to the valuation fixed thereon as previously directed, and each tract located at a greater distance than one mile and less than two miles from such road shall be assessed at seventy-five per cent of the value thereof, as previously fixed, and all the tracts more than two miles therefrom shall be charged with fifty per cent of said valuation; and in determining the share of any tax bill or bonds to be taxed against each and all tracts of land in the road district, the rule of apportionment above stated shall govern

72 the county clerk in extending the taxes on the tax-books kept by him for that purpose.

Section 10616, provides that upon filing said tabulated statement of the valuations, and said report, maps and profiles the Board of Commissioners shall call a general meeting of all the land-owners in the district, etc., and give twenty days' notice thereof. At such meeting the board shall submit the report containing the estimates, together with the maps and profiles, made by the engineer, to the land-owners for examination, and shall take a vote of those present on the following propositions:

First. Shall the roads mentioned in said report be constructed or improved according to any of the plans and out of any of the materials therein set out, and the cost thereof to be charged against the lands in the district?

Second. What materials shall be used in constructing said road or roads?

Third. Shall the cost be paid (1) at once, or (2) distributed through five years, or (3) distributed through twenty years?

Then follows a provision as to the number of votes each land-owner has, and the number necessary to carry each proposition submitted.

Section 10617, provides that if the land-owners vote as previously stated, in favor of the improvements and to charge the cost thereof against the lands, as previously stated, then the commission shall make out and sign and acknowledge, etc., a report of the action of the land-owners at said meeting, and file the same with the Clerk of the County Court, and said clerk shall enter the same upon the records of said court, and from the filing of said report said public road district, by the name mentioned in the preliminary order of the court, shall be a political subdivision of the State, for governmental purposes with all the powers mentioned in said
73 Article 7. That if the owners of a majority of the acres of the land in the district do not vote for the construction of the improvements mentioned, then the board of Commissioners shall report that fact to the County Court, and the court shall make an order rescinding its former preliminary order establishing the district, and order that all the costs thereof be paid out of the general road funds of the county.

Section 10618, provides that after any such road district has been established the board of commissioners shall employ a competent engineer to draw plans and specifications for the construction of the roads and the materials to be used, etc., according to the vote of the land-owners, as in section 10616 directed. That after said specifications have been approved by the board of commissioners they shall be filed with said commission, and thereupon said commission shall in the name of said district enter into a written contract with the lowest and best bidder, to construct the roads, etc.

Section 10619, provides that if, at the general meeting of the land-owners, previously mentioned, they should vote for the payment of the entire cost, by one assessment, the contract should provide for the payment of said work or improvements by special tax bills issued against the lands in the district, in the proportions previously mentioned, and that upon the completion of the work, and the acceptance of the same, etc., the board of commissioners shall make out and certify to the County Clerk a statement of the contract price of the entire improvements, a description of each tract of land embraced in the district, lying within one mile of the road, and of each that is situated more than one and less than two miles therefrom, and of each tract which is located at a greater distance than two miles, accompanied with a statement of the number of acres in each tract, and the name of each record owner thereof, and
74 the valuation fixed thereon by the commission, which shall be acknowledged, etc. That thereupon the Clerk of the County Court shall apportion to each tract its share of the cost of said improvements and make out separate, special tax bills against each tract for the amount apportioned it as provided for by section 10615, which shall be payable to the contractor within sixty days from issue, etc. That said bills shall be signed by the president of the board and attested by the County Clerk, delivered to the con-

tractor and accepted by him in full payment for his work, etc. That said tax bills shall be a lien upon the respective tracts of land against which they are issued, and if not paid when due, the owner may sue thereon in the Circuit Court at any time within two years thereafter, etc. That before issuing said tax bills the County Clerk shall enter in a book to be denominated "Special tax record of — road district," a description of the tax bills by number, amount, payee, date of issue and maturity, and the numbers of the land and the names of the owners, if known, etc. Said record book shall be kept in the office of the County Clerk, and a duplicate thereof shall be made by him and deposited with the County Treasurer, and he shall give to the owner of each tract if known, or if not known, to the occupant, a notice of the amount due on said bill and when due.

Then follows a minute provision as to how the tax bills shall be paid, and the release and cancellation of the same.

Section 10620, provides that when the land-owners at the general meeting authorized by section 10616, shall by vote, direct that the cost of said improvements shall be made payable in annual installments extending over five or twenty years, as the case might be, the board of commissioners shall issue the bonds of the district for the length of time by said meeting directed, and in an amount
75 not to exceed the estimates submitted to said meeting, plus ten per cent thereof, and enter into a contract for the construction of said road as directed by sections 10618, and 10619, of this article, except the contract for the improvements shall provide that the cost thereof shall be paid for in money instead of special tax bills.

Provided, however, the board of commissioners may use said bonds or any part thereof at par in the payment of said work. That said bonds shall run in the name of the road district, bearing six per cent interest, payable at the expiration of the time indicated by the land-owners at said general meeting, etc. Said bonds shall be signed by the president of the road district and attested by the County Clerk, who shall before their delivery register them in a suitable book procured for that purpose. That whenever the board of commissioners shall sell any of said bonds for the payment of any work to be performed under this article, the proceeds thereof shall be paid to the County Treasurer, who shall enter the same to the credit of said district, etc., and shall pay the same out on the warrants drawn by the board of commissioners. That the board of commissioners shall make out and certify to the County Clerk a statement of the amount of the bond issue, and a description by numbers of each tract of land in the district lying within one mile of the road, and of each that lies a greater distance than one mile and less than two miles, and of each tract that lies a greater distance than two miles therefrom, with a statement of the number of acres contained in each tract, and the valuation placed thereon by them, and acknowledge the same as is provided for acknowledging deeds to real estate, and file the same with the Clerk of the County Court.

Thereupon said clerk shall apportion to each and all of said tracts, according to the rule prescribed by said section 10615, its share of

said bond issue, etc., and enter the same in a book to be de-
76 nominated "bond tax record of — road district," and shall append thereto his certificate as County Clerk, and from said date such apportionment shall be a charge against the tracts of land indicated, until paid.

The County Clerk shall in each succeeding year make out a duplicate of so much of said bond record as will indicate the portion of said charge each tract is to pay for that year, etc., and deposit said duplicate record with the Collector of Revenues of the county, etc., and said collector shall annually make out separate tax bills against each tract for the amount shown by the duplicate record, and collect the same as other taxes are collected, and receipt for them in the same manner. Each tax bill shall contain the name of the owner of each tract, and if not paid on presentation shall bear interest, etc., and if not paid within six months, suit may be brought thereon by the Collector to the use of the owner thereof, etc. That a judgment in any such suit shall be a lien on the lands described in the tax bills, and sued on, etc. The Collector shall deposit all moneys by him collected on said tax bills with the County Treasurer, etc.

Then follows a provision fixing the liability of the Collector for the collection of said tax bills, the fees he shall receive for his services, the receipts he is to give in satisfaction of the same when paid, and the release of the tax against the lands, etc.

Section 10621, provides as to how titles to certain lands must be considered, which is not important in this case.

Section 10623, authorizes the board of commissioners to employ County Surveyor and Bridge Commissioner to perform certain work.

Section 10624, provides that the County Clerk shall set aside to the credit of the road district the portion of the revenues for
77 working the public roads that may be raised by direct taxation against the property lying therein, according to any existing laws or subsequent enactment, and said revenue shall be spent by said board of commissioners for keeping any road within the district in repair. Also a proper apportionment of any license taxes and poll taxes and city revenue raised and set aside to any special road district organized under this article, be made by the County Court and turned over to said board of commissioners. That any road overseer who shall be such under any law at the time of the organization of such road district shall turn over to the board of commissioners any tools, graders, scrapers or implements of any kind in his possession which may by a proper apportionment belong to such district.

Then follows a provision authorizing the board of commissioners to make contracts for the improvement of the roads of the district from time to time, and paying for the same out of the funds coming into its hands.

And section 10625, provides that all poll taxes of the district shall be paid in cash and placed to the credit of the district.

Opinion.

I.

Counsel for appellants first insist that the judgment of the Circuit Court was erroneous because the taxes levied against their property, under and by virtue of Chapter 102, Article 7, R. S., 1909, are illegal, for the reason that said article authorized said levy without notice to them, and therefore authorizes the taking of their property in violation of Sections 21 and 30 of Article 2 of the Constitution of this State, and Section I of the Fourteenth Amendment of the
78 Constitution of the United States.

These constitutional provisions, in substance, provide, (1) that private property shall not be taken for public use without just compensation, and (2), that no person shall be deprived of his property without due process of law.

There is absolutely no merit in either of these contentions.

Regarding the first: This Court from its earliest history down to this time, has uniformly held that special taxes or benefits, such as were levied against appellants' property, under said article 7, are not public taxes within the meaning of the constitution authorizing the levy and collection of taxes for public or governmental purposes, but are special taxes assessed against the property for the payment of the improvements made upon the highways in the vicinity of the property, which in legal contemplation adds to the value of the property as much or more than the amount of the taxes imposed.

It would serve no good purpose to cite authorities in support of this ruling, save the case of Ranney v. The City of Cape Girardeau, not yet reported, wherein many of the cases so holding are cited by Judge Lamm.

Attending the second: This contention is also untenable for the reason that this Court and the Supreme Court of the United States have repeatedly held that where these special benefits are levied, and no provision is made for the property owners to be heard during the proceedings imposing the special benefits, and where they are only collectable by suit, as in the case at bar, then all legal defenses the property owners may have, from the inception of the proceedings down to the rendition of the judgment of the court on the tax bills, may be pleaded and contested in the same manner that any legal or equitable defense may be made in any other action at law or in equity.

The only procedure prescribed by said Article 7, for the
79 collection of these benefits is section 10620, previously mentioned, which only authorizes their collection by suit in the Circuit Court.

In treating this question, Page & Jones on Taxation by Assessment, Section 119, uses this language:

"The general rule is that at some time before the assessment becomes an absolute finality there must be a notice to the property owner and an opportunity for a hearing as to those questions of fact

which concern the amount of the assessment to be imposed upon such property, except such as the legislative power has authority to determine without special enquiry, and has in fact so determined. * * * If such notice is not given and under the law the assessment becomes a finality, subject to be enforced summarily, without giving any opportunity for a hearing as to the question of fact which concern the amount of the assessment other than those which the legislative power has authority to determine without special enquiry, and which the legislative power has in fact so determined, such assessment then constitutes a taking without due process of law and is in violation of the constitutional provision under consideration."

In Section 132, the same authority says:

"If the assessment is to be enforced summarily without notice or judicial proceedings, it is evident that no opportunity is thereby given to the property owner to contest the assessment on its merits. * * * If notice has not been given at a prior stage of the proceedings so that the property owner has an opportunity to contest the assessment on its merits, the proceeding is in violation of the constitutional provision which forbids the taking of property without due process of law."

Also Pash vs. City of St. Joseph, not yet reported.

In Section 773, the same authority says:

"If the assessment can be enforced only by an action at law
80 or a suit in equity, and in such proceeding the property owner is given a full opportunity to be heard upon the question of benefits, the property owner is not entitled, as of constitutional right in the absence of statutory provision therefor, to any notice, except that of the institution of such proceedings to enforce the assessment."

In Hagar v. Reclamation Dist., 111 U. S. 701, it is held that:

"A law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the Fourteenth Amendment of the Constitution, which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity, or the amount of it, either before that amount is determined or in a subsequent proceeding for its collection."

The same ruling has been announced by this Court in the following cases:

City of St. Louis v. Richeson, 76 Mo. 470; Kansas City v. Huling, 87 Mo. 203; Saxton National Bank v. Carswell, 126 Mo. 436; Springfield v. Weaver, 137 Mo., 650-672.

The case of City of St. Louis v. Rankin, 96 Mo. 497, is not in conflict with the principles of law announced in the foregoing cases. In that case the question was, had the provisions of an ordinance of the city authorizing the improvements to be made, and the assessment of benefits therefor, been complied with?

Said ordinance provided that notice should be given of the establishment of the benefit district, the time and place of making the assessments, and giving the property owners the right to be then heard upon those propositions. This ordinance was wholly ignored

and this Court held, and properly so, that the assessments were void because those provisions of the ordinance had not been com-
81 plied with.

While it is true, in that case the charter and ordinances of the city provided, as do those of most of the cities of the State, that if any property owner shall consider himself aggrieved by the award of the commission chosen to assess the damages and benefits, he may file in the Circuit Court exceptions to the report of the commissioners, which shall be heard by said court, etc.

In that class of cases the law-making power has deemed it proper to give the property owners two hearings, one before the commissioners and another in the Circuit Court. But there is no such provision as there stated, provided for in the statutes under consideration in this case.

I am, therefore, clearly of the opinion that there is no merit in either of those contentions of counsel for appellants.

II.

If I correctly understand counsel for appellants, they lodge an additional objection against the validity of section 10615, of Article 7, of Chapter 102, of R. S. 1909, which is closely related to or germane to the questions presented and disposed of in paragraph One of this opinion.

In substance, it is contended that said section divides the road district into three benefit zones of one mile each, and further provides that the lands in the first shall be assessed according to their values, say 100%, the second at 75%, and the third at 50% of the values of which are to be fixed by the board of commissioners, without notice to the property owners.

This contention can be more logically considered by dividing it into two elements and considering each separately.

First. It is contended that because said section 10615, of
82 the statutes, arbitrarily divides the road district into three beneficial zones, and assesses the lands in each at a different percentage, without giving the property owners in each, notice thereof, and an opportunity to be heard thereon, is violative of said Section 30 of Article II of the Missouri Constitution and therefore deprives them of their property without due process of law.

In answer to that contention it is sufficient to state, that said division of the road district into zones and the fixing of the percentage of benefits to the lands in each are legislative acts which cannot be questioned upon the ground of want of notice to the property owners.

The reason for this rule is, that the authority to create benefit districts and the percentage of the benefits to be assessed rest solely with the legislature, which, however, may delegate that authority to certain officers and institutions of the State, such as the Common Councils of the various cities of the State and the county courts of the various counties thereof, and so long as they act within their legislative authority their acts cannot be questioned because of want of notice in the absence of some charter, ordinance or statutory provision to

the contrary. Such acts are known as legislative enactments or legislative assessments, as the case may be.

This has been so often decided by this Court and the Supreme Court of the United States, that it is no longer open for discussion.

The case of Naylor v. Harrisonville, 207 Mo. 341, l. c. 353, reviews some of the cases deciding this question by both this Court and the Supreme Court of the United States.

There is therefore no merit in this contention.

The second objection before mentioned, namely: that while it may be conceded that the division of the districts into zones and
83 the percentage of benefits to the lands in each zone, may be legislative acts, yet, the valuation of the lands by the board of commissioners in each and all of the zones, upon which the percentage of benefits is to be based was not made or fixed by the legislature, but by said board, and is therefore subject to question by the property owners in each and all of them, and if not afforded that right, then the proceedings would result in taking their property without due process of law.

It must be conceded that if appellants' major premise is true, then the sequence must necessarily follow. But is the major premise true? I think not, for the reason, as before stated, namely, that each and all property owners within the district, who considered himself or themselves aggrieved by the valuation of his or their lands by the board of commissioners, are offered an opportunity for a full hearing upon that question in the Circuit Court when suit is brought upon the tax bill, which cannot be collected in any other manner.

This proposition was fully considered and decided in clause Two of paragraph One of this opinion, and there is nothing additional, that I know of, that could with profit be added to what is there stated.

I am, therefore, of the opinion that there is no merit in this contention.

III.

It is next insisted by counsel for appellants, that said section 10615 of Article 7 is unconstitutional, null and void, because, as stated, it is class-legislation, in that it authorizes the taxation of the real estate of the district according to its reasonable value, exclusive of the buildings thereon. In other words, it is contended, that the taxation of the lands and not the buildings thereon, is an unreasonable and
84 unjust classification, and therefore the statute authorizing that to be done is class-legislation, within the meaning of the State and Federal Constitutions.

There is no constitutional provision prohibiting legislation which embraces all persons and things that naturally belong to the same class and are similarly situated and upon whom it must operate uniformly and equally. State ex rel. v. Standard Oil Co., 218 Mo., 1, and cases cited.

The case of Corrigan v. Kansas City, 211 Mo. 608, in the majority opinion written goes to the extent of holding that property of the

same class, if belonging to different classes of owners, may be exempt from the payment of these special benefits.

I did not then, nor do I now subscribe to that doctrine; for the reasons stated in the dissenting opinion at page 633; but independent of that error, as I see it, that case properly recognizes the authority of the legislature to make reasonable and natural classifications of property for the purpose of assessment, to pay for local improvements. In fact, that rule of taxation is recognized and enforced by practically all, if not all, of our cities, towns and villages in paying for street and other improvements and the cost of constructing sewers, etc., as is shown by the scores of cases which have reached this Court. Moreover, it would be difficult to conceive of a more natural classification of real estate than that of soil, buildings, trees, etc. This classification runs all through the laws of states and nations: and without it, legislation regarding questions of rents, landlord and tenent, fire insurance, arson, mechanics' liens, railroads, telegraph and telephone lines, and all classes of local improvements, such as streets, alleys, sewers and public parks in cities, and drainage and levee districts in the country, would have to rest upon totally different
85 foundations than it now does; and to abolish that classification, at this late date, would disturb the whole fabric of our jurisprudence and would inject therein endless confusion and complications.

Even though we should consider orchards, vineyards, and other such betterments added to the soil by the hand of man, as improvements, yet there is a clear distinction between that class of improvements and those known as houses, buildings, etc.

The former becomes not a fixture to the land, but a part of the soil itself, as it were. They owe their life to, and draw their substance, growth and development therefrom, aided by the air, rain and sunshine—without which they would die, perish and return to dust; but not so, as to the latter—they owe no debt to the earth, except for the footstool upon which they stand.

I am, therefore, clearly of the opinion that there is no merit in this insistence.

IV.

Counsel for appellants also insist that said Article 7 is unconstitutional, null and void because it authorizes the road district to create a bonded indebtedness in excess of the constitutional limitation.

The constitutional provision referred to is section 12, of Article X; and in so far as it is material to this question, reads as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount in-
86 cluding existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be

ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness."

The assessments authorized by said Article 7 of the statute, are for the payment of local improvements, denominated special benefits to the land against which the assessments are made; and for that reason this Court has uniformly held that such assessments do not constiute an indebtedness within the meaning of the constitutional provision just quoted. Ranney v. Cape Girardeau, supra. In fact, I do not understand counsel to contend that they do; but be that true or not, the uniform ruling of this Court has been that no such assessment constitutes an indebtedness within the meaning of that provision, but are special assessments made to pay for the special benefits accruing to the property by reason of the local and special improvements—the one offsetting the other.

I also understand from the briefs and arguments of counsel for appellants, that they practically concede that if under said sections 10619 and 10620, the property owners of the district had have voted in favor of paying the entire costs of the improvements by one assessment, then a special tax bill would have been issued against each tract of land in the district, which would have constituted a special lien thereon, and would not have constituted an indebtedness of any kind against the road district as such, in any sense; but be that as it may, there is no language contained in the said article which remotely indicates that such assessments would be an indebtedness against the district. But upon the contrary, the whole import and meaning of the article is to the contrary.

But the real contention of counsel for appellants is, that since the land-owners did not vote in favor of paying the entire cost of the improvements by one assessment, but by installments, as provided for by said section 10619, then it became the duty of the district to issue its bonds for the amount of the estimated cost of the improvements, plus 10%, and that they be sold in the manner prescribed for, and that the proceeds thereof be used in the construction of the roads ordered, etc.

From that premises it is insisted and argued with much force and earnestness, that since the bonds are the bonds of the district, the indebtedness which they represent must also be that of the district, and consequently they must pay by it.

If that contention is true, then clearly the district would, by said section 12, of the Constitution, be prohibited from issuing the bonds in question, for the reason that their face value would far exceed the constitutional limitation contained therein.

If that is the meaning to be placed upon the statute, then I do not understand counsel for respondent to differ from counsel for the opposition as to what would be the legal effect of the constitution upon the statute and upon the bonds proposed to be issued under that authority.

Under that assumption counsel for both parties would be compelled to admit that the statute would be unconstitutional and the bonds would be void. But the record in the case fails to disclose that counsel for respondents are so generously inclined as to admit

that counsel for appellants have correctly interpreted said statute; consequently they persist in their contention that the statute is constitutional and that the bonds if issued, would be valid.

The basis of this contention is the same as that, upon which it is practically conceded, as previously stated, that if the vote of the land-owners had been in favor of paying the entire cost of
88 the improvements by one assessment, then the tax bills would have been a special lien against the respective tracts of land, and not an indebtedness of the road district, as such.

If I correctly read and understand the meaning of sections 10619 and 10620, there is no difference in principle between the character of the indebtedness created for the payment of the special benefits conferred by the improvements or by what hand the same is to be paid, whether it is payable by one assessment and evidenced by a single tax bill issued against each tract of land, and delivered to the contractor, or whether the indebtedness is to be paid for by annual installments evidenced by several tax bills issued against each tract, and collected by the County Collector, and the proceeds thereof turned over to the County Treasurer for the purpose of paying the bonds as they mature, instead of the tax bill, had they been based upon one assessment, and had been delivered to the contractor in the first instance, as previously stated.

The indebtedness voted by the land-owners, whether payable by a single assessment or several, constitutes liens upon the respective tracts of land in the district, in proportion to their respective values, and must be paid severally by each land-owner, whether paid in bulk or in annual installments. If in bulk, the payments would have been made payable to the contractor, because in such case the tax bill would have been made payable to and delivered to him, but if in installments, then they would have been payable to the County Collector, and by him turned over to the County Treasurer, and by him paid to the bond-holders, whoever they might be.

This is not controverted by counsel for appellants, but they insist that there is no provision contained in said article 7 of the statutes, which authorizes the issuance of such bonds, containing a clause showing that they are only payable out of the special
89 benefits collected, and, therefore, they must be considered and treated as the bonds of the district and not simply evidences of an indebtedness, only payable, as previously stated, out of the proceeds of special tax bills issued for benefits imposed against the several tracts of land in the district, and collected in the manner therein provided for.

This contention is unsound for two reasons, first: because the statute does not undertake to prescribe the form of the bonds to be issued, and the presumption is that the officers charged with their execution will issue bonds in harmony with the provisions of the statutes authorizing their issuance and the purpose for which they are executed and the means of their payment.

If those mandates of the statutes are complied with, the bonds upon their face, as well as the statutes authorizing their execution, which must be read into the face of the bonds, will conclusively

show that they are not the bonds of the road district, but simply evidences of an indebtedness payable out of the proceeds of the special tax bills issued against the lands embraced in the district, for the benefits mentioned.

And the second reason mentioned for saying that said bonds are not the obligations of the road district is this: That in considering the nature and character of the bonds in question it is the duty of the Court and all parties dealing with them, to read and consider in connection therewith the entire article of the statute bearing thereon and authorizing their execution; and by so doing it will clearly appear that no authority is given to any officer of the county or road district to levy or collect any tax with which to pay said bonds, except the special assessments authorized for the improvements mentioned, which are for the benefit of the respective landowners, and not for the benefit of the district itself. Moreover, the district as such, has no means out of which it could pay said
90 bonds, nor any authority to make assessments therefor, except in the manner previously stated, which conclusively shows that the indebtedness is against the lands and not against the road district.

The principle underlying these observations was presented to this Court in the case of State ex rel. v. Gordon, 223 Mo. 1. There one of the questions presented was regarding the form of the bonds to be issued.

The bonds were issued under the statutes authorizing the issuance and sale of bonds for the purpose of building school houses and furnishing them. One of the points made was that the bonds issued should have shown upon their face (which they did not do) that they were issued for the purpose of building school houses and for furnishing the same.

This Court in a very carefully considered opinion, written by Judge Lamm, held that the bonds issued were valid, notwithstanding the omission from the face thereof the purposes for which they were issued.

Judge Graves dissented from the entire opinion for several reasons, one of which was, that the recital mentioned did not appear on the face of the bond, impliedly holding that the recital should have been made.

Counsel for neither party nor did any member of the Court contend or hold that such a recital in the bonds would have been improper, but with the exception of Judge Graves, were of the opinion that the bonds were not invalid because of such omission—believing that the statutes should be read into the face of the bonds, which would be as effectual as if the recital had been actually written in the face of the bonds.

I am, therefore, of the opinion that this contention is without merit, and it is ruled against appellants.

91 V.

It is also insisted by counsel for appellants that said article 7, is unconstitutional for the reason stated, "that it turns over the care and

maintenance of the public high-ways to a body of land-owners and also confides to them the expenditure of public moneys."

This is clearly a misconception of the statute. Section 10617, in clear and unambiguous language declares that after the meeting of the land-owners, and their votes are cast in favor of the propositions contained in the previous section, the district "shall be a political subdivision of the State for governmental purposes with all the powers mentioned in this article and such others as may from time to time be given it by law."

The board of commissioners are in the first instance appointed by the County Court, and thereafter elected by the land-owners of the district.

Under these statutes all such road districts are public corporations, organized under the unquestioned authority of the legislature.

Harris v. Bond Co. 244 Mo. 664.

And as was held in that case, the commissioners appointed or elected in the manner provided for by section 10613 are public officers for the purposes mentioned in said article 7.

Moreover, all of our drainage districts are organized and administered by a board of commissioners in pursuance to statutes practically similar to these under consideration.

This being true, there remains no foundation whatever for this insistence to rest upon; and it is accordingly ruled against the appellants.

92 Entertaining these views of the case I am perfectly satisfied that the statutes in question are valid, and that no error was committed by the Circuit Court in the trial of the cause.

The judgment is affirmed.

Graves, Bond & Walker JJ. concur. Lamm C. J. dubitante, Brown J. dissents. Faris, J. not sitting.

A. M. WOODSON, *J.*

93 In the Supreme Court of Missouri, in Banc.

And thereafter, towit, on April 11th, 1914, the following further proceedings were had and entered of record in said cause:

17450.

"W. S. EMBREE et al., Appellants,
vs.
KANSAS CITY-LIBERTY B'L'V'D RD. DIST. et al., Respondents.

Come now the said appellants by attorney, and file their motion for rehearing, and argument in support thereof."

And thereafter, to wit, on April 13th, 1914, the following further proceedings were had and entered of record in said cause:

17450.

"W. S. EMBREE et al., Appellants,
vs.
KANSAS CITY-LIBERTY B'L'V'D ROAD DIST. et al., Respondent-.

Now at this day, the court having considered and fully understood the motion of the said appellants for rehearing herein, doth order that said motion be and the same is hereby overruled."

Which said motion for rehearing is in words and figures as follows, to-wit:

94 In the Supreme Court of Missouri, in Banc.

No. 17450.

W. S. EMBREE et al., Appellants,
vs.
KANSAS CITY & LIBERTY BOULEVARD ROAD DISTRICT et al., Respondents.

Motion for Rehearing.

Now come the appellants herein and move the Court to grant a rehearing in this case for the following reasons, to-wit:

First. Because, in its opinion the Court has overlooked and has not decided the principal questions raised by appellants—that the statute in this case is unconstitutional, because, appellants are given no opportunity to be heard on the question of whether their property will be, in fact, benefited by the improvement. This question is raised by appellants under point II, at pages five and ten of their original brief; is again discussed by appellants page 4, point II, of their reply brief; was passed on adversely to these appellants in the first decision rendered by this Court—opinion by Brown, J.,—point III, and again raised by these appellants in their brief after the rehearing was granted, page 8, point III.

Second. The Court has overlooked and failed to decide the point raised by appellants in their original brief and argued to this Court in the original hearing, and no where abandoned on page 17 of the original brief, that the present Road District attempts to include incorporated towns within its limits. The present opinion of this Court, on its first page, says:

"There is no pretence but what the district was duly incorporated under the provisions of said article."

In this the Court very evidently overlooked the serious point raised by these appellants that incorporated towns could not
95 be included in these road districts.

SIMRALL & SIMRALL AND
CRAVEN AND MOORE,
Counsel for Appellants.

96 In the Supreme Court of Missouri, in Banc.

And thereafter, towit, on April 2nd, 1914, the following further proceedings were had and entered of record in said cause:

"W. S. EMBREE, ELLIS GITTINGS, A. N. GITTINGS, C. T. PRITCHARD, S. W. ALLEN, and W. H. ALSTON, Appellants,

vs.

KANSAS CITY-LIBERTY BOULEVARD ROAD DISTRICT OF CLAY COUNTY, Missouri, W. W. Cosby, A. W. Lightburne, and T. J. Ward, Respondents.

Appeal from the Circuit Court of Clay County.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Clay County rendered, be in all things affirmed and stand in full force and effect, and that the said respondents recover against the said appellants their costs and charges herein expended, and have therefor execution. (Opinion filed.)"

97 STATE OF MISSOURI, *set:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing is a full, true and correct copy of the transcript of the judgment and all proceedings in this Court, as fully as called for in the Praecipe filed by Plaintiffs in Error herein, in the said cause of W. S. Embree et al., Plaintiffs in Error v. Kansas City & Liberty Boulevard Road District et al., Defendants in Error, as the same appear of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of our said Supreme Court. Done at my office in the City of Jefferson, State aforesaid, this 23rd day of June, 1914.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk Supreme Court of Missouri.

Endorsed on cover: File No. 24,289. Missouri Supreme Court. Term No. 187. W. S. Embree, Ellis Gittings, A. N. Gittings, et al., plaintiffs in error, vs. Kansas City & Liberty Boulevard Road District of Clay County et al. Filed July 2d, 1914. File No. 24,289.

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IN THE

Supreme Court of United States

OCTOBER TERM, 1915.

W. S. EMBREE, ELLIS GITTINGS, A. N. GITTINGS ET AL.,
Plaintiffs in Error,

vs.

KANSAS CITY AND LIBERTY BOULEVARD ROAD DISTRICT OF CLAY COUNTY ET AL.
Defendants in Error.

No. 187

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

JOHN M. CLEARY,
Counsel for Plaintiffs in Error.

JAMES F. SIMRALL,
ERNEST SIMRALL,
W. A. CRAVEN,
HARRIS L. MOORE,
Of Counsel.

INDEX OF STATEMENT, BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

IN THE

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Defendants in Error.

No. 187

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

Plaintiffs in error brought a suit in the Circuit Court of Clay County, Missouri, to enjoin the levy and collection of a special benefit tax in the sum of $77,000 against lands owned by them in the respondent road district and also to enjoin the issue and sale of bonds in the amount of $70,000 based on said tax, all under the provisions of article 7, chapter 102, Revised Statutes of Missouri, 1909.

It was alleged in the petition and expressly admitted in the answer that defendants had taken the necessary preliminary steps and if not enjoined would proceed to assess and record said tax and issue said bonds (Trans. of Rec. pp. 11-17). While there was some evidence, the pleadings admit all the facts necessary to raise the question of the constitutionality of the statute.

The ground of said suit is, among other things, as stated in the petition, that the levy and collection of this tax and issue of bonds constitute a taking the property of plaintiffs in error without due process of law contrary to section I of the 14th Amendment to the Constitution of the United States (Trans. of Rec. p. 13).

The trial court found in favor of respondents and dismissed the petition (Trans. of Rec. p. 19). Plaintiffs in error appealed to the Supreme Court of the State of Missouri where the cause was submitted to the court *in banc* and a unanimous opinion rendered holding the statute bad and reversing the decree of the lower court (Trans. of Rec. pp. 26-41).

On a rehearing (p. 42), however, the Supreme Court of Missouri, four of seven judges concurring, reversed its former opinion and sustained the decree of the trial court dismissing the petition of plaintiffs in error (pp. 48-56). Writ of error from

this court was granted by Chief Justice of the Supreme Court of Missouri.

Both opinions of the Supreme Court of Missouri recognize the question here raised, to be properly before it (Trans. of Rec. pp. 32, 48).

The statute in question authorizes any body of property owners to mark out the boundaries of a road district (in fact, a benefit district), containing not less than 640 acres or more than a county (Rev. Statutes of Mo., 1909, sec. 10611), and to define the same in a petition, which must be presented to the county court (Id., sec. 10612), signed by the owners of a majority of the acres in the district. The road proposed to be improved is not specified in the petition, but the county court makes an order for the property owners in the district to meet and vote on whether they will improve a road, what road, and at what expense, and in what time the costs shall be paid (Id., sec. 10616). If at this meeting the proposition to improve any of the roads is carried, then three commissioners who have previously been appointed by the county court or elected by the property owners, proceed to appraise all the land in the district at its value (Id., sec. 10615); the cost of the road is then divided among the tracts of land in the district, on a basis of their value at a ratio prescribed by the statute, apportioned with interest added, through the number of years it is to be

paid for (twenty in this case), then recorded by the county clerk in the public records, as a lien on the land (Id., sec. 10629); the commissioners of the district then proceed to sell the bonds (Id., sec. 10629), which the Supreme Court of Missouri holds are in fact not bonds, but merely assignments of these recorded liens (Trans. Rec. pp. 53 and 54), take the money and build the road; afterwards, it becomes the duty of the public authorities, for the benefit of the purchasers of these various liens or bonds, to sue each property owner, who fails to pay separately, on each yearly installment of his tax, and collect the same with attorneys' fees, costs and penalties added (Id., sec. 10629).

Our contention, under this statute, as construed, is, that when a statute delegates the power to certain property owners to mark out the boundaries of a benefit district, when framing their petition to incorporate, and thereby to say what property shall be taxed for the improvement, there must be a hearing given to the owners of property so included at some time, as to whether the land so included is in fact benefited; that such hearing is denied by the decision of the State Supreme Court.

Also that a hearing, if any, after the tax has been apportioned amongst the tracts of land, recorded, sold, the money spent, and penalties and costs accrued comes too late.

Plaintiffs claimed, when before the Supreme Court of Missouri, that the property owners were denied due process of law for two reasons; first, because this statute delegated to three commissioners the right to assess the value of the lands in the district, and no hearing was accorded the property owners whereby such valuation could be corrected.

Second (as here) because the statute delegated to a self-appointed body of property owners the right to outline a benefit district, containing anything less than a county, then permitted them to assess the benefits against the lands so selected by them, without any hearing as to whether such land was, in fact, so benefited (Trans. Rec. p. 13).

The State Supreme Court decided that we are entitled to a hearing on the first question, and it is given us when final suit is brought to collect the tax; that we were not entitled to any hearing on the second question.

That is, to state it with more detail, in paragraph I of its opinion, the court held that due process of law was not denied plaintiffs in error, by the statute, because, when a final attempt was made to collect the benefit assessment by suit, although after such benefit had been sold, in each of the twenty suits, each property owner could make every "legal defense" he might have. The Supreme Court, however, further held, in clause 4

of paragraph II, that the fact that the property was not benefited, was not a legal defense, and that we were not entitled to the hearing on this question because this is what is known as a "legislative assessment" of a "legislative district" (Trans. Rec. p. 48).

The court further held, in clause 5 of paragraph II, that the question of whether the land was properly valued by the commissioners was a proper defense in these final suits (Trans. Rec. p. 51).

The first and principal error in this opinion, which we wish to press in this court, is, that when the Supreme Court of Missouri, in said clause 4 of paragraph II, declares that this is a legislative assessment or a legislative district and we are therefore entitled to no hearing on that question, it is plainly in error, for the boundaries of this district have been defined by a self-selected body of property owners, under the authority delegated to them by the statute, to mark out a district that is anything more than 640 acres and less than a county, and not by the legislature (Session Acts, Missouri Legislature, 1911, p. 373). It can in no sense be called a legislative district. We are plainly entitled to have this action of the property owners reviewed and the decision of the Supreme Court of Missouri denies us this right, and hence denies us due process of law.

The only other proposition we wish to present is, that where, in paragraph I, the Supreme Court of Missouri holds that there can be no denial of due process of law, because these taxes are to be collected by suit, and further holds in clause 5 of paragraph II that the *valuation* of each piece of land by the commissioners may be tested in such suits (Trans. Rec. pp. 48, 51), it is again in error, and denies us due process of law, because a hearing at such time is too late and inadequate, whether on the amount of the benefit or the right to assess at all, or both. The tax at this time has been levied, assessed, apportioned as against each piece of land in the district, and recorded as a lien and the tax on each piece of land divided into twenty installments and finally sold for cash to disinterested persons, who have received no other value for their money. Besides this, twenty suits may be brought against each piece of property, and the property owner in each of these twenty suits, which continue over a period of twenty years, is liable for attorneys' fees, costs and penalties if he fails to make good the defense to the whole of each of the twenty assessments. The suits are brought by the county officers, on behalf of whoever may be the beneficiaries.

Unfortunately, the decision of the Supreme Court of Missouri is not as clear as could be wished, on the questions involved, but we think that we have above correctly interpreted it.

ASSIGNMENT OF ERRORS.

I.

The Supreme Court of Missouri erred in holding in subdivision (4) of paragraph numbered II of its opinion herein that a benefit district formed under the statute in question is a "legislative district" and that therefore no hearing on whether property is or is not actually benefited is necessary in order to comply with the requirements of due process of law when, in fact, such statute delegates to interested property owners the right to mark out said district without any hearing and any property owner is entitled to a review of their decision or due process of law has been denied him.

II.

The Supreme Court of Missouri erred in holding in paragraph I of its opinion that a hearing given to the property owner in the district at the time he is sued on an installment of his benefit tax is such an *adequate* hearing as due process of law demands, in that such hearing comes after the tax has been levied, apportioned amongst the

pieces of property, divided into twenty installments, recorded in a public record as a lien on the land, sold, and the money spent, and each property owner wronged, must defend twenty suits, continuing over a period of twenty years with with penalties and attorneys' fees taxed against him in case of any recovery.

III.

The Supreme Court of Missouri erred in holding and adjudging the statute, article 7 of chapter 102 of the Revised Statutes of Missouri, 1909, as amended by an act entitled "Roads and Bridges: Special Road Districts: Benefit Assessments. An act to amend sections 10611, 10616 and 10620 of article 7, chapter 102, Revised Statutes 1909, relating to special road districts—benefit assessments—by striking out of each of said sections certain words and inserting in lieu thereof certain other words, and by adding a new section to such article and chapter to be numbered section 10625a, providing that when the major part of certain tracts of land lie within certain distances of roads to be improved the whole of such tracts shall be held to lie within the same distances approved, etc.," to be a valid and constitutional law and especially in holding that said statute did not contemplate the taking of property without due process of law contrary to the

14th amendment to the Constitution of the United States.

IV.

The Supreme Court of Missouri erred in holding that the proceedings to issue bonds to pay for the improvement of a road and the levy of a tax thereunder on plaintiffs' lands under and by virtue of said statute was not a taking of said lands and did not deprive plaintiffs of their said property without due process of law contrary to said 14th Amendment to the Constitution of the United States.

POINTS AND AUTHORITIES.

I.

Where the power to determine the boundaries of the benefit district, that is to say, what property shall be assessed to pay for an improvement is delegated to a non-legislative body, due process of law demands notice and a hearing on whether the property so marked out for taxation is, in fact, benefited.

Fallbrook Irrigation District vs. Bradley, 164 U. S. 170;
Argyle vs. Johnson, 118 Pac. Rep. 487, 39th Utah 500;
Spencer vs. Merchant, 125 U. S. 345;
Soliah vs. Haskin et al., 222 U. S. 522, 149 U. S. 30;
In re Sewer in Kissel Ave., 143 N. Y. S. 467;
Bauman vs. Ross, 167 U. S. 548.

II.

While it is true that ordinarily a benefit assessment that must be collected by suit cannot be said to be wanting in due process of law, yet if in such suit the property owner cannot have tried the

question of whether his property is benefited, then such suit does not constitute due process of law as to that question, or supply the lack of a hearing thereon.

Londoner vs. Denver, 210 U. S. 373, loc. cit. 385;
In re Riverside Park, 138 N. W. 426;
Argyle vs. Johnson, 39th Utah 500;
Central of Georgia Ry. Co. vs. Wright, 207 U. S. 127;
Norwood vs. Baker, 172 U. S. 269.

III.

The decision of the Supreme Court of Missouri, insofar as it construes the statute in question, is conclusive, and where it has held that the statute contains a legislative determination of the benefit district, then that is a conclusive decision that there is no hearing on that question, when suit is brought to collect.

Central of Georgia Ry. Co. vs. Wright, 207 U. S. 127.

IV.

While the fact that a benefit assessment is to be collected by suit ordinarily constitutes due process of law, yet when a benefit assessment has become a final lien, divided into twenty installments, recorded in the public records as a lien on the land, and sold for cash, even if it is a fact that each property owner may defend each of the twenty suits required to be brought against each separate piece of property, being subject to heavy penalties and attorneys' fees in case of failure to make good the defense in whole or in part, there is neither such timely nor adequate hearing as is necessary to constitute due process of law.

Authorities cited under Point II.

ARGUMENT.

As we have indicated in the preceding statement of our case, the principal point we wish to present is, that where a statute delegates to any property owners who so desire, the right to mark out the district that is to be taxed to build a road, at the time they frame their petition to incorporate a road district, such district is not a "legislative district," but a hearing as to its boundaries is necessary and the state court erred in not so holding.

In this connection we wish also to present the further proposition that, even if it were true that all these defenses could be presented to these suits, to require the property owner to come into court twenty times continuing over a period of twenty years, and at his own cost to defend twenty suits in an attempt to show that in fact he was not benefited, or that in fact the property was not valued correctly, when he must pay penalties, costs and attorneys' fees every time he is defeated, or even if he only partly makes good his defense, is hardly adequate protection. This is emphasized by the

fact that under the statute in question, all these twenty installments have long since been recorded in the public records as a lien on the land and have been sold, necessarily, we would think at a great sacrifice, because it is hardly conceivable that a sane man would give full value for a lien where the property owner still has the right to contest both the amount and the propriety of the levy on unsolved questions of fact.

In order to present these questions, after copying the parts of the statute in question, we will analyze it and the effect of the opinion of the Supreme Court of Missouri as applied to it.

THE STATUTE.

The provisions of the statute that affect the question raised in this case, are these:

Section 10611. (As amended in 1911) (Session Acts, Missouri Legislature, 1911, p. 373). "County courts of the several counties of this state may divide the territory in their respective counties into road districts * * * *

* * * * * * *

Said district shall contain at least six hundred and forty acres of land of contiguous territory and may be commensurate with a municipal township, and if laid out along any thoroughfare may be of any length deemed necessary and advisable except that every district shall be included wholly within the county organizing."

Section 10612. (Revised Statutes of Missouri,

1909, Art. 7, Chapter 102). "Petitions—Notices—Remonstrances—Order of Court. *Whenever a petition, signed by the owners of a majority of the acres of land within a district proposed to be organized* and setting forth the proposed name of the district, *and giving the boundaries* thereof and the number of acres owned by each signer, and the whole number of acres embraced therein, and the names of other owners of land in said district so far as known, and the number of acres owned by each so far as known, and praying for the organization of such public road district in accordance with this article, shall be filed in the office of the clerk of the county court, thirty days before the beginning of the next regular term of said court, the said clerk shall give notice by at least three publications in some weekly newspaper printed in the county and by at least five handbills put up at public places within the district, of the presentation of said petition, and of the date of the beginning of the next regular term of the county court at which the same may be heard. Said notices shall contain the names of at least three signers of said petition and set out the boundaries of the said proposed district, *and shall notify all owners of land in said proposed district who may desire to oppose the formation thereof* to appear on the first day of such regular term of court and file their written remonstrance thereto. All land owners owing land within the proposed district may join in one remonstrance, or each such owner may file his separate remonstrance, and *each remonstrance shall be in writing, and shall state specifically and separately the objection or objections of the remonstrators to the formation of said proposed road district* and shall be filed in said court with the clerk thereof on or before the first day of said regular term. On the first day of said term of

court, or as soon thereafter as its business will permit, the court shall hear such petition and remonstrance and *shall make such change in the boundaries of such proposed district as the public good many require and make necessary, and if after such changes are made it shall appear to the court that such petition is signed or in writing consented to by the owners of a majority of all the acres of land within the district as so changed, the court shall make a preliminary order establishing such public road district* and such order shall set out the boundaries of such district as established * * *"

Section 10613. (Rev. Statutes of Mo., 1909, Art. 7, Chap. 102). "Commissioners, how selected. At the term of court in which the preliminary order is made, or at any subsequent term thereafter, the said court shall appoint three commissioners, who shall be owners of land within the district, who shall hold their office until the first Tuesday after the first Monday in January thereafter, and on said date the land owners in said district, at an hour and place to be fixed by said commission, shall elect three commissioners, one of whom shall serve for one year, one for two years, and one for three years, and on the first Tuesday after the first Monday in January each year thereafter they shall elect a commissioner to take the place of the one whose term is about to expire, who shall serve three years."

Section 10615. (Rev. Statute of Mo., 1909, Art. 7, Chap. 102.) "Commissioners to fix valuation on lands—other duties. The said commissioners shall fix a fair and impartial valuation on *each tract of land within said district independent of the buildings* thereon and make a tabulated statement or chart of such valuations, according

to the numbers of the lands, names of the owners, if known, and indicate therein what tracts lie within one mile of the road proposed to be improved, and what at a greater distance than one mile, and less than two miles, and what at a greater distance than two miles, and where it is proposed to improve more than one road, there shall be a separate tabulated statement for each road. Said statement of valuations shall be signed by said commissioners and acknowledge by them. * * * They shall thereupon request the county surveyor or bridge commissioner to draw up estimates of the costs of any road to be improved, and if no such engineer can be furnished, they shall employ one at a compensation to be fixed by them and for such a time as they may determine. Said engineer, under the direction of the commission, shall make estimates of the cost of macadamizing, graveling, grading, filling, tiling or otherwise improving or constructing *any road in said district designated by said commission to be improved.* * * * Each tract of land within one mile of any road to be improved shall, in the making up of such estimates, be charged in proportion to the valuations fixed thereon as above directed, and each tract at a greater distance than one mile and less than two miles from any such road in proportion to seventy-five per cent of such valuations, and each tract at a greater distance than two miles from said road in proportion to fifty per cent of such valuations; and in determining the share of any tax bill or bonds any tract of land in said district should bear, the county clerk shall be guided by the same rule of appointment. Said tabulated statement of valuations, and said engineer's estimates and apportionment, together with the maps and profiles, when made to the satisfaction of said commission, shall be filed with the presi-

dent or secretary, and shall, from the date of their filing, be open to the inspection, under proper regulations, of all owners of land within the district."

Section 10616. (Sess. Act Mo. Legislature, 1911, p. 373). "Meeting of land owners, how called—propositions to be omitted. * * * Upon the filing of said tabulated statement of valuations and said report, maps and profiles, the board of commissioners shall call a general meeting of the land owners of said district at some convenient place therein, and shall give at least twenty days' notice of the time and place of such meeting and the purpose thereof, by at least ten printed or written hand bills put up in public places therein and by at least three publications in a weekly newspaper published in said county. At such meeting the board of commissioners shall submit the report containing the estimates, together with the maps and profiles made by the engineer to the land owners for examination and explanation, and shall take a *viva voca* vote of the land owners present on the following propositions:

First: Shall the roads mentioned in said report be constructed or improved according to any of the plans and out of any of the materials therein set out and the costs thereof charged against the lands in said district?

Second: That materials shall be used in constructing or improving said road or roads?

Third: Shall the cost be paid (1) at once, or (2) fix and determine the number of years, not to exceed twenty, through which such costs shall be distributed?

Each land owner shall have as many votes, on every proposition, as he owns acres of land in the district. For a determination of the first

proposition in the affirmative the vote of the owners of a majority of the acres of land in the district shall be necessary; for a determination of the second and third propositions what materials shall be used, and that term of payment be decided upon which receives the affirmative vote of a majority of the acres of land represented by land owners present and voting. In determining the first proposition the land owners may determine by one vote to construct or improve all the roads proposed by the commissioners for construction or improvement, or may vote for each road separately."

Section 10617. (Rev. Statutes of Mo., Art. 7, Chap. 102). "After voting upon propositions, further duties of commissioners. *If the owners of a majority of the acres of land in such district shall vote in favor of constructing or improving any of the roads in said report mentioned* and to charge the cost of said work against the lands in said district, then the said commissioners shall make out and sign and acknowledge, in the manner that conveyances of real estate are by law required to be acknowledged, a report of the action of said land owners at said meeting, and file the same with the clerk of the county court, and said clerk shall enter the same upon the records of said court, and from the filing of said report said public road district, by the name mentioned in the preliminary order of the court, establishing it, *shall be a political subdivision of the state for governmental purposes with all the powers mentioned in this article* and such others as may from time to time be given it by law. *If, however, the owners of a majority of the acres of land in said district do not vote to construct or improve any of the roads proposed by said commissioners* and to charge the lands therein with the cost thereof, then said commissioners shall so report to the county

court, and the *court shall make an order rescinding its former preliminary order establishing said road district.*"

Section 10620. (Sess. Acts of Mo. Legislature, 1911, p. 374). "Installment assessments. * * * When the land owners, in general meeting as prescribed in section 10616, shall direct that the cost of the construction or improving any road shall be distributed through a number of years, not to exceed twenty, and shall fix and determine such number, the *board of commissioners shall issue the bonds of the road district for the length of time by said meeting directed, and in an amount not to exceed the estimates submitted to said meeting plus ten per cent thereof* and enter into a contract for the construction of said road as directed in sections 10618 and 10619, of this article, except that said contract shall provide for a payment of said work in money instead of special tax bills. Provided that said commission may use said bonds or any part thereof at par in payment after said work. * * *

The board of commissioners shall make out and certify to the county clerk a statement of the amount of the bond issue, and a description by number of each tract of land in said district lying within a distance of one mile of the road to be improved, and of each tract at a greater distance than one mile and less than two miles, and of each tract of a greater distance than two miles and the number of acres in each tract, and the valuation placed thereon by them, and acknowledge said certificate in the way that conveyances are required by law to be acknowledged, and file the same with the county clerk. The county clerk shall thereupon apportion to each tract, according to the rule prescribed by section 10615, *its share of said bond issue, principal and interest, stating each separately, the interest*

being the amount necessary to pay the interest on the bonds as it annually becomes due and shall enter the same in a book to be denominated 'bond tax record of ..... road district,' and shall append his certificate thereto as county clerk, and from said date such apportionment shall be a charge against the tracts of land indicated until paid. The county clerk shall on each successive year make out a duplicate of so much of said bond record as will indicate the portion of said charge each tract is to pay for that year, principal and interest, and deposit said duplicate record with the collector of the revenue of the county or with the collector of revenue of the township or townships in which the road district may lie according as such county may or may not be under township organization, and said collector shall annually make out separate tax bills against each tract of land for the amount shown by the duplicate book deposited with him to be due and collected the same time he collects direct taxes levied for any governmental purpose, and in the same manner receipt for the same. *Said tax bill shall contain the name of the person shown by the records to be the owner thereof, and if not paid on presentation shall bear one per cent interest from the first day of the following January, for each month the same remains unpaid, and if not paid within six months of said date may be recovered by a suit brought to the use of the collector of the revenue of the county, and in such suits the same commissions shall be allowed to the tax attorney of the county as are allowed for bringing suits for the collection of delinquent taxes,* and such suits may be brought as such suits for taxes may by law be brought, and in such cases *the tax bill shall be prima facie right of the plaintiff to recover.* A judgment in such suit shall be made a lien on the land described in the tax bill and a sale

thereunder shall carry all the title and interest in said lands of every person who has according to law been made a party defendant to such suit. * * *"

ANALYSIS OF THE STATUTE.

The effect of the different provisions of the foregoing statute, to which we wish to direct this court's attention are these:

The first section, 10611, defines the size of the benefit district, which shall be not less than 640 acres nor more than a county. It is noticeable that this section speaks of the county court dividing the county into road districts. Afterwards, it appears in the statute that the only method of forming a district is by petition from the property owners; while this section reads as if there were several limitations on the size of the district, it is apparent that its only real limitation is that it must be between 640 acres and a county in size, and as will appear, by the succeeding sections, the power to say what land shall or shall not be assessed for the costs of the proposed road improvement inside of these broad limitations is delegated to a body of property owners.

There is no other restriction as to shape or size; part of the land included may have no means of reaching the roads improved; some may be separated from such road by insurmountable barriers.

The next section, 10612, provides: "Whenever a petition signed by the owners of a majority of acres of land within a district proposed to be organized * * * and giving the boundaries thereof" * * * is presented to the county court, signed by the majority of property owners in such district, the county court "shall make such change in the boundaries of such proposed district as the public good may require and make necessary" * * * then *shall* make a preliminary order establishing such road district.

This section is a plain and complete delegation of the power to the self-selected body of property owners when they draw up and sign the petition, to mark out their own benefit district that they proposed to tax; it will be noted that while there is a hearing before the county court, there is no provision in this section whereby such county court is directed to exclude land that will not be benefited and indeed such a provision would be foolish, because the property owners, when they present the petition, are not required, and it would be impossible, under the provision in this act for them, at that time, to state what road or roads they propose to improve and no court can pass upon whether particular pieces of land will be benefited by the improvement of a road unless it can be shown to it what road will be improved.

In other words, in order to effectively prevent a hearing on this question at this stage, the statute uses the simple device of authorizing the property owners to frame their benefit district *before* they have committed themselves as to what road they will improve but reserves to them the power to do that afterwards.

It will be noted that the Supreme Court of Missouri in its first decision of this case (Trans. of Rec. p. 35), holds that the property owners could have a hearing on the question of whether they would be benefited or not at this time, but it recedes from that position in its second opinion, where no such statement is made, but where, on the contrary, it is asserted that the property owner is not entitled to any hearing at any time on such question. The change of the court on this question is doubtless due to the fact that it overlooked, in its first opinion, where it directed the county court to give such a hearing, the insurmountable obstacle thereto in that the road co ld not be decided upon at that time.

It will further be noted that this section only provides for a preliminary and temporary organization of the so-called road district, which, as we will show later, under the provisions of this statute, is in fact merely a benefit district.

Section 10613 provides for the appointment by the county court, and afterwards the election by

the property owners of three commissioners whose duties, however, are mostly ministerial.

Section 10615 provides that the commissioners shall fix the value of the land in the district and shall then take the preliminary steps necessary to enable the property owners to decide by a vote on concrete questions, what road they wish to improve, how, at what cost and the time of payment; and when they have so valued the land and arranged the preliminaries, they are to call a meeting of the property owners.

Section 10616 provides that when the property owners meet they shall vote upon these questions: "Shall a road be improved? How? At what cost? And when shall it be paid for? Each land owner having as many votes as he owns acres in the district."

We wish to call attention to these significant facts in this section: Here, the whole power (usually considered a legislative function) to decide upon a levy of a tax, its amount, and the application of the money, also how it shall be paid, is delegated to the same body of property owners who frame the petition and thereby decide *what property shall be taxed.*

In other words this section, taken in connection with section 10612, authorizes any self-constituted body of property owners to build themselves

a road at any cost they please and themselves say what property shall be assessed to pay for such road, the only limitation, in fact, being that they must not take in enough acres to outvote them. The significance of these sections, taken together, becomes clear when we consider that the unlimited power given these property owners to frame their own benefit district, enables them, with a little forethought, to escape any possibility of being deprived of the road they want built, either by any judicial acts or by the minority property owners, for the reason that they only have to count acres and be careful in framing their benefit district not to include a majority of acres that will vote against the road and they are fully protected from any action of the county court, by reason of the fact, that the court has no way of knowing or ascertaining what road they will improve until after the land owners' meeting.

Furthermore, after this land owners' meeting and vote of the property owners, provided for in this section, all other acts are purely ministerial and the assessment ripens into a lien, is apportioned, recorded and sold, without the chance of a hearing or interference by anyone. We call especial attention to these facts, because, if we understand the decisions, the greater the power delegated, and the more oppressively it may be used, the greater is the necessity for a hearing and the

more zealous will the courts be to see that it is adequate.

Section 10617 provides that if the owners of a majority of the acres have voted to improve a road, then the district becomes a permanent political subdivision of the state, but if such property owners fail to so vote "the court shall make an order rescinding its former preliminary order establishing such road district."

When the county court passes on the petition of the majority property owners outlining the district, it does not incorporate a permanent road district, but, in effect, makes an order for the property owners to take a vote on whether they will make the improvement and levy the tax; if they vote "yes" that of itself constitutes the assessment of the tax, every act after that is ministerial; if they vote "no" the district is disincorporated.

Thus the district as outlined is a benefit district pure and simple until after the tax is assessed, then it becomes also a road district.

Section 10629, provides, that when the land owners shall vote to distribute the cost of constructing a road over a term of several years (twenty in the present case), the board of commissioners shall issue serial bonds of the road district and sell them.

The Supreme Court of Missouri, in its opinion

in this case, holds that these so-called bonds are in no sense debts of the district (Trans. of Rec., p. 52), but are merely assignments *pro tanto* of the benefits levied upon the lands; there is absolutely no other source of payment.

It is further noticeable that the bonds are not required to be sold at par, presumably they could be sold for 25, 50 or 75 per cent of their face value; the section then provides that the money so realized shall be used in building a road; that the commissioners shall make out and certify a statement of the amount of the bond issue, "*and a description by number of each tract of land in said district,*" lying in each of the three different zones into which the district is divided by this section; that by rules laid down by this section, after adding interest for the twenty years to the apportionment against each piece of land, such apportionment is recorded in the public records as a lien and charge against the land, "*and from said date such apportionment shall be a charge against the tracts of land indicated until paid.*" (Sess. Acts Mo. Legislature 1911, p. 375.)

The section then further provides that annually the collector shall make out separate tax bills for one-twentieth of the amount due on each piece of land; that the tax bills shall be *prima facie* evidence of the liability and may be recovered in separate suits, subject to the same attorneys'

fees (10 per cent) and the same penalty (1 per cent a month) as provided by the statute of Missouri in the case of general taxes. (R. S. Mo. 1909, Section 11497.)

This section, it will be noted, provides that the tax becomes a charge fixed and recorded in the public records against every piece of land in the district long before any suit is brought upon it and that it is by that time also sold and the money spent.

In other words, if it is true that the property owner may defend any or all of the twenty cases against him on the ground that his property is valued wrong and also on the ground that he does not properly belong in the district, and if this is an adequate protection, then we have here a statute providing that a tax may be sold that is not fixed, either in fact or amount; in other words, is unlevied and unassessed and is not finally and completely fixed and determined for twenty years after the tax has been sold and the money spent, and to meet the peculiar situation thereby produced and throw the burden on the property owner, there is naturally no provision that the sale of these benefits must bring par, the buyer takes the chance and the property owner pays, at that time, the costs, penalties and attorneys' fees, if any part of the tax is finally established against his land.

SUMMARY OF THE STATUTE.

This statute presents an extreme case calling for the necessity of a full and adequate hearing to the property owner on the question of whether he is properly included in the district or not; this is because it delegates plenary power of taxation and assessment without check or hindrance to an interested and therefore prejudiced body of property owners.

Sections 10611 and 10612 taken together, are a complete delegation to the property owners of the power to frame a benefit district including anything less than a county.

There is no place where it is even possible to revise their action until the final suit is brought to collect.

Such action cannot then be revised because Section 10620 says again and again that *each piece of land in the district shall be assessed;* in such suit the court will have before it only one-twentieth of the amount due on one tract of land and cannot readjust the assessment; the lien of the assessment has been fixed by the act and the court cannot remove it in direct violation of the terms of the statute "shall be a charge against the tracts of land indicated until paid"; the assessment has then been sold and the money paid; the benefit district has developed into a permanent road dis-

trict, all of which the statute contemplates must bear this burden. The hearing at this time would be an inadequate protection.

Thus the statute not only, in terms, denies this hearing but its whole framework is so thoroughly inconsistent therewith that to give a hearing then destroys it as a working law.

Expressed in another way, this statute (if held valid) simply provides, when analyzed, that any body of property owners in any county of the state who own 640 acres of land or more, may decide in their own minds on any road they wish to improve and thereupon may call upon as many of their neighbors as they can out-vote, counted by acres, to assist them in paying for such improvement. The non-consenting property owners are powerless at any stage of the proceeding to interpose an objection until after the tax is finally sold and the money spent and the liens recorded against all the lands, then in small suits extending over a period of twenty years the non-consenting property owner is called upon to fight for his rights against the purchaser of these benefits that have been charged against his land and which have been sold out at such price as the commissioners may see fit or can secure.

We do not believe that this was the intention of the statute and we do not believe that it is the

effect of the decision of the Supreme Court of Missouri, but if it is both, then we do not believe that this delayed hearing is adequate protection.

THE DECISION OF THE SUPREME COURT OF MISSOURI.

Of course, the construction placed upon this statute by the Supreme Court of Missouri, in its opinion in this case, is absolutely controlling, and if that construction, whether right or wrong, gives us due process of law, we have no standing here.

This, and the further fact that said opinion nowhere expressly undertakes to decide the exact question we are presenting, although such question was put squarely before it, necessitates a discussion of the opinion of the Supreme Court of Missouri, that there may be no mistake as to its meaning.

The Supreme Court of Missouri, in clause 4 of paragraph II of its opinion, says: * * * "the authority to create benefit districts rests solely with the Legislature. * * * their acts cannot be questioned because of want of notice; * * * such acts are known as legislative enactments or legislative assessments as the case may be."

The foregoing portion of the court's opinion decides, in terms, that a district created under this statute, constitutes both a legislative apportionment and *legislative determination of the benefit*

district; if we are correct about this, then it is not necessary to look further into the opinion, because if the Supreme Court of Missouri is mistaken as to this district being a *legislative* benefit district, then that error in itself unquestionably constitutes a denial of due process of law to the property owners, because it deprives them of a hearing to which they would be entitled.

That the Supreme Court of Missouri meant exactly what it said in clause 4 of paragraph II quoted above, is further borne out by the fact that the only case it cites to support the statement therein made, is the case of *Naylor vs. Harrisonville* (207 Mo. Sup. 341, l. c. 353), which is a case under the front-foot rule, and which holds that where property is assessed with a benefit under that rule, there is a legislative determination, both of the *fact of a benefit to the property* and the apportionment of the benefit.

That the statement in the opinion was intended to mean all that it says is further borne out by the fact that the principal question we are here presenting was prominently and squarely before the Supreme Court of Missouri, not only in the brief, but in our petition filed in the trial court, and which originated this whole proceeding (Trans. Rec., p. 13). The question is there clearly presented and it was fully presented and urged upon the Supreme Court of Missouri at both hearings.

And the fact that the Supreme Court of Missouri had nowhere expressly undertaken to decide this exact question, was called to its attention in a motion for rehearing (Trans. Rec., p. 57.)

The Supreme Court of Missouri also recognized in its first opinion (Trans. Rec., p. 35) that this question was before it and clearly stated it, but unless clause 4 of paragraph II of the final decision of the Supreme Court of Missouri decides this question, it was intentionally omitted from the opinion, which would be almost inconceivable.

At first glance, it might seem possible that the Supreme Court of Missouri intended to decide this question in paragraph I of its opinion, but an inspection of the former opinion of the Supreme Court (Trans. Rec., p. 35 *et seq.*) will show that there was before that court just two constitutional questions; in one of which we urged that a hearing was necessary on the valuation of the lands fixed by the commissioners, and under the other, we insisted that a hearing was necessary on whether we were in fact benefited or properly included in the benefit district.

The reading of authorities cited by the court to sustain paragraph I of its opinion will show that each and every one of said authorities bears out the statement that where a benefit tax, which has been assessed according to the valuation, is to

be collected by suit, the *valuation* of the land may be corrected in such suits; there is not, under said point, one authority cited on the question of a legislative district or a legislative apportionment.

Again, the court itself, under clause 5 of paragraph II, construes for us what it meant to decide in paragraph I of its opinion; it there says:

"Each and all property owners within the district who considered himself or themselves aggrieved by the *valuation of his or their lands by the board of commissioners* are offered an opportunity for a full hearing upon that question in the Circuit Court where suit is brought upon the tax-bill, which cannot be collected in any other manner. This proposition was fully considered and decided in *clause 2 of paragraph I of this opinion*, and there is nothing additional, that I know of, that could with profit be added to what is there stated."

In paragraph I of its opinion, consequently, the Supreme Court of Missouri simply decides that we are entitled to a hearing in the final suits, on the question of whether our land had been properly valued and therefore were not denied due process of law by not having a hearing sooner on that question. There were only the two constitutional questions before that court and it plainly decides as to one of them, we were entitled to a hearing, and as to the other, we were not, and

the question on which we were not entitled to a hearing, was the question stated in our petition, to-wit, whether we were properly included in the benefit district, although unfortunately the Supreme Court of Missouri mis-stated this question when it undertook to decide it.

If the Supreme Court of Missouri did not decide in paragraph II of its opinion that we were not entitled to the hearing we here claim, then it did not construe the statute on that point at all and the statute is left open to be correctly construed by this court.

This statement is further borne out by the fact that paragraph I of the opinion of the Supreme Court merely says that a property owner can never be denied due process of law, where a benefit assessment must be collected from him by suit, because he can there present every legal defense he has. It wholly overlooks the fact that if the statute is so framed, as this one is, as to preclude the court from entertaining a defense, that would be necessary in order to constitute due process of law, then the fact that the property owner is summoned into court is of small importance, since it is his right to an adequate hearing on the question, not the mere fact of being summoned into court that constitutes due process of law.

The only other statement in this decision that throws any light on the question is where the court, under paragraph IV (Trans. Rec., p. 54), says:

"The indebtedness voted by the land owners, whether payable by a single assessment or several, constitute *liens* upon the *respective tracts of land in the district*, in proportion to their respective values, and must be paid severally by each land owner."

It would seem that the court would not have spoken of these assessments as "liens upon the respective tracts of land in the district" if it had just decided, either in paragraph I or II, that the fact of lien or no lien could only be determined in the final suit to collect. If the right to levy the assessment depended on a wholly unsettled question of fact, the court certainly could not say it was a lien until such question was settled.

Before leaving the discussion of this opinion, it is best to call attention to the fact that in its first opinion (Trans. Rec., p. 35), the Supreme Court of Missouri held that we were entitled to a hearing on whether we were benefited or not, and that we could receive such hearing when we were first notified to appear at the County Court at the inception of the whole proceeding; besides the fact that this position was clearly erroneous, because there could be no such hearing at that

time, since the road to be improved had not been determined upon, the Supreme Court of Missouri clearly receded from this position in its final opinion, and we have inserted the former opinion into our transcript of record merely to show this court exactly what questions were before the Supreme Court of Missouri for decision.

AUTHORITIES.

The question of whether the property owners in this district are entitled to a hearing on whether their property is properly included in the benefit district or not almost determines this case, and it seems to us that, on the authority of this court, it ought not to be a very difficult question.

The case of *Fallbrook Irrigation District vs. Bradley*, 164 U. S. 112, l. c. 174, is a case where the irrigation statutes of California were in question; the formation of the benefit district was by the property owners in their petition, as under this statute; this court in that case says:

"The Legislature thus in substance provides for the creation not alone of a public corporation, but of a taxing district whose boundaries are fixed, not by the Legislature, but, after a hearing, by the board of supervisors, subject to the final approval by the people in an election called for that purpose. It has been held in this court that the legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local public improvement. The Legislature when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to

the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.*, the amount of the tax which he is to pay. *Paulson vs. Portland*, 149 U. S. 30, 41. But when, as in this case, the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. *Unless the Legislature determine the question of benefits for itself, the land owner has a right to be heard upon that question before his property can be taken.*"

However, in this case of *Fallbrook Irrigation vs. Bradley*, the statute provides a timely hearing as to whether the property owner is benefited or not, and the decision is that, had such hearing been wanting, the statute would have been held bad for want of due process of law.

Argyle vs. Johnson, 118 Pac., p. 487; is a case decided by the Supreme Court of Utah, where the principles laid down in *Fallbrook Irrigation District vs. Bradley* are followed and applied; in this case, the statute is so similar to the statute here in question, that there arises a strong presumption

that the Missouri road statute is either an adaptation of the Utah irrigation statute to road work, or else that they both sprang from the same parent. The Supreme Court of Utah holds that due process of law is denied the property owner because there is neither a legislative determination that the property included will be benefited nor hearing on that question. It is true the assessment was not collected by suit, but the Supreme Court of Utah expressed the opinion that, even had a suit been necessary it would not, under the circumstances, have supplied the want of due process of law, and while this part of the opinion is *dicta,* both the reasoning and authority entitle it to weight.

The act, indeed, provides that the property owner might bring a suit to test the validity of the proceeding; a suit that under the circumstances was a more adequate remedy than the suits to collect under our Missouri statute, but the court say:

"If in the contemplated action any objecting land owner could present and have determined the question of whether his lands are benefited and hence should be included or excluded, within or without the drainage district, the law might perhaps not be objectionable upon the ground now under consideration. It will be seen, however, that the only matter which can be heard and determined in the contemplated action referred to are such as may affect 'the validity of the organi-

zation' of the district. This action, therefore, is not intended for the purpose of determining what the boundaries of the district should be nor what lands should be included within the district."

Soliah vs. Hoskin et al., Drainage Commissioners, 222 U. S. 522, is the last decision by this court where the subject is touched; there this court says:

"Neither does that amendment invalidate an act authorizing an appointed board to * * * create a drainage district consisting of land which it decides will be benefited by such drain * * * if, as here, notice is given and an opportunity to be heard is given the land owner *before the assessment becomes a lien against his property.*"

Bauman vs. Ross, 167 U. S. 548, is a road case where the benefit district was fixed by a jury of seven; it is evident from a reading of this decision that this court considered the hearing therein given, necessary to the validity of the proceedings.

Spencer vs. Merchant, 125 U. S. 345, l. c. 354, is again a clear statement of the principle, that when the authority to fix the benefit district is delegated to a non-legislative body there must be a review of its decision.

It would be useless to multiply the cases from this court and the state courts on this general proposition; there can be no reason why it is not as necessary or more necessary to give the owner his hearing on whether his land will be benefited

or not, where the Legislature has not decided that question, as to give him a hearing on the *amount* of his benefits; these two questions naturally merge into each other and in a case like this, where the amount of the benefit is placed *ad valorum* on the real estate, the question of benefit or no benefit is of immensely more practical importance to the owner than the amount of the benefit.

It is true that several of the statutes that have been in judgment before this court and the state courts, where this power has been delegated, contain some provisions directing the property owners or commissioners, to whom such power is given, how they should exercise the power, that is, that they should include the lands that would be benefited, or that they should include the lands susceptible of drainage by one system of drainage, etc.; this statutes contains no such provision; it leaves the owners to include anything they see fit, less than a county, without any express direction whatever, but we cannot believe that this peculiarity can cause any serious question about this statute falling under the principle announced in the authorities; in the first place, the omitted directions must necessarily be implied; no court would for a minute hold that the Legislature intended to authorize the property owners to include lands in their benefit district, *that would not be benefited*, because the fact of a benefit is also the basis for

the levy of such an assessment and it must be presumed that the Legislature intended the district to be framed rightfully and not wrongfully; again, this court has said, in many cases, for instance, in *Londoner vs. City of Denver, supra*, that this right to a hearing is a matter of substance, not form, and if it were true, that a legislative body by merely omitting from an act any directions to the body to whom the power is delegated to frame the benefit district, concerning the kind of lands to be included, could thereby render the acts of that body a final determination of the benefit district, without a hearing, when otherwise one would be necessary, then the property owner would be deprived of this hearing merely by the omission of words from the statute, that in no way help his case or lessen the necessity for such a hearing, but rather increase it; hearing or no hearing would become wholly a matter of the formal wording of the statute.

A statute, as here, that directs certain persons to mark out the lands to be taxed is not different from a statute that directs the same persons to mark out the lands benefited, so they will be taxed; the effect is the same.

The Legislature unquestionably has the power to denominate any political subdivision of the state a benefit district and thereafter there can be no question raised as to whether any land in that sub-

division is benefited or not; such was the case in *County of Mobile vs. Kimball*, 102 U. S. 691, l. c. 705, but the distinction between a case of this class and the question presented under the statute here is so obvious, that it seems argument ought not to be necessary. Statutes like the one in that case designate a political subdivision of a state already formed, as a benefit district, the Legislature acts on an existing fact and no one is called upon to exercise any discretion or decide any fact, no other will intervenes between the Legislature and the property owner. The statute in question here does not even say that after a political subdivision is formed it shall become a benefit district, but provides that after a benefit district has first been formed, under delegated authority, and a tax levied, then it thereafter becomes a political subdivision and called a road district. On principle the fact that the benefit district afterwards becomes a road district cannot validate the tax that has already been assessed without a necessary hearing, but aside from this, many of the statutes in decision under the authorities cited (under point I, *supra*) were so similar to this statute that no distinction can be drawn, and on authority as well as reason, it must be held that this was a delegation of the power to fix the boundaries of the benefit district, which the property owners are absolutely entitled to have revised at an appropriate hearing at some time before the tax is final.

The only other question in this case on which a discussion of authorities seems pertinent, is whether the fact that the benefits in this district must be collected by suit in an answer to our claim that we are denied due process of law. *Hagar vs. Reclamation District*, 111 U. S. 701, and *Davidson vs. New Orleans*, 96 U. S. 97, were both cases in which this court said in substance that where a benefit assessment is to be collected by an ordinary suit, due process of law is not wanting; in both these cases, however, it seems that the suit provided for by the statute was one brought immediately following the assessing of the benefit, being in the nature of a review thereof, and where the property owners were practically all before one court at the same time, as well as the whole aggregate benefits; there had been no sale of the benefits, no division into installments and no recording as a lien and the Supreme Court of each of the states had distinctly held that the defense of a benefit or no benefit could be made in these suits; it is the facts just recited that distinguish this case from these two decisions of this court.

Londoner vs. The City of Denver, 210 U. S. 373, l. c. 385, is a case where the benefit has to be collected by suit, as here, but this court held that if the property owner was denied a hearing to which he had a right, the fact that the benefit must

afterwards be collected by suit would not accord to him due process of law; the court said:

"That the full hearing before the board of equalization excludes the court from entertaining any objections that are cognizable by this board." "The law of Colorado denies the land owner the right to object in the courts to the assessment upon that ground that the objections are cognizable only by the board of equalization."

Other cases cited (under point II, *supra*) illustrate other instances where the fact that the benefit is to be collected by suit does not give to the property owner due process of law, the principles to be drawn from these decisions are, that in order to constitute due process of law, of itself, the suit must be one where the property owner has a fair opportunity to have the exact question tried, that is, a determination of whether his property is benefited or not, and this right must not be denied to him by the statute or by the statute as construed by the state courts; the suit must be brought and the trial held before the tax becomes a lien, the penalties imposed and impediments thrown in the way of a trial of the question must not be such as to render the right valueless to the property owner; the suits provided for in this case offend each and every one of these provisions. We have not been able to find any decisions as to the effect of a suit brought after the benefit has been sold in the form of a bond.

of the cities of the State, that if any property owner shall consider himself aggrieved by the award of the commission chosen to assess the damages and benefits, he may file in the Circuit Court exceptions to the report of the commissioners, which shall be heard by said court, etc.

In that class of cases the law-making power has deemed it proper to give the property owners two hearings, one before the commissioners and another in the Circuit Court. But there is no such provision as there stated provided for in the statutes under consideration in this case.

I am, therefore, clearly of the opinion that there is no merit in either of those contentions of counsel for appellants.

II.

If I correctly understand counsel for appellants, they lodge an additional objection against the validity of section 10615, of Article 7, of Chapter 102, of R. S. 1909, which is closely related to or germane to the questions presented and disposed of in paragraph One of this opinion.

In substance, it is contended that said section divides the road district into three benefit zones of one mile each, and further provides that the lands in the first shall be assessed according to their values, say 100 per cent, the second at 75 per cent and the third at 50 per cent of the values of which

are to be fixed by the board of commissioners, without notice to the property owners.

This contention can be more logically considered by dividing it into two elements and considering each separately.

First. It is contended that because section 10615 of the statutes arbitrarily divides the road district into three beneficial zones, and assesses the lands in each at a different percentage, without giving the property owners in each notice thereof, and an opportunity to be heard thereon, it is violative of said section 30 of Article II of the Missouri Constitution and therefore deprives them of their property without due process of law.

In answer to that contention it is sufficient to state that said division of the road district into zones and the fixing of the percentage of benefits to the lands in each are legislative acts which cannot be questioned upon the ground of want of notice to the property owners.

The reason for this rule is, that the authority to create benefit districts and the percentage of the benefits to be assessed rest solely with the legislature, which, however, may delegate that authority to certain officers and institutions of the state, such as the Common Councils of the various cities of the State and the county courts of the various counties thereof, and so long as they act within their legislative authority their acts cannot

be questioned because of want of notice in the absence of some charter, ordinance or statutory provision to the contrary. Such acts are known as legislative enactments or legislative assessments, as the case may be.

This has been so often decided by this Court and the Supreme Court of the United States that it is no longer open for discussion.

The case of Naylor v. Harrisonville, 207 Mo. 341, l. c. 353, reviews some of the cases deciding this question by both this Court and the Supreme Court of the United States.

There is therefore no merit in this contention.

The second objection before mentioned, namely: That while it may be conceded that the division of the district into zones and the percentage of benefits to the lands in each zone may be legislative acts, yet, the valuation of the lands by the board of commissioners in each and all of the zones, upon which the percentage of benefits is to be based, was not made or fixed by the legislature but by said board, and is therefore subject to question by the property owners in each and all of them, and if not afforded that right, then the proceedings would result in taking their property without due process of law.

It must be conceded that if appellants' major premise is true, then the sequence must necessarily follow. But is the major premise true? I think

not, for the reason, as before stated, namely, that each and all property owners within the district, who considered himself or themselves aggrieved by the valuation of his or their lands by the board of commissioners, are offered an opportunity for a full hearing upon that question in the Circuit Court when suit is brought upon the tax bill, which cannot be collected in any other manner.

This proposition was fully considered and decided in clause Two of paragraph One of this opinion, and there is nothing additional, that I know of, that could with profit be added to what is there stated.

I am, therefore, of the opinion that there is no merit in this contention."

The remainder of the opinion is devoted to other grounds arising out of the State Constitution and Laws.

The State Supreme Court having held in terms that all legal and equitable defenses may be made in a suit to collect the taxes, it was unnecessary for the court to discuss in its opinion the proposition pressed by plaintiffs in error that the Statute does not afford to an objecting land owner any opportunity *at the time of the organization* of the District to show that his lands will not be benefited and should not be included in the district.

If the right is accorded to make this defense, as held by the Supreme Court, before any of his

property can be taken or appropriated to pay for the improvement, the land owner is not denied due process of law.

It is a mistake, however, to say that the Supreme Court of Missouri held that the Legislature formed the Benefit District and laid out the boundaries thereof, and therefore the land owner is *not entitled* to a hearing upon the question of benefits.

It is respectfully submitted that the opinion does not so hold. The excerpt (page 33 of the Brief of Plaintiffs in Error) from the opinion is only part of a sentence. The entire sentence and its connection show that the court was discussing the right of the Legislature to provide for *three zones* in a special benefit road district formed under the Act and to lay down a different rule for taxing the lands in each zone. As set out in the brief the statement is: "The Supreme Court of Missouri, in clause 4 of paragraph II of its opinion, says: * * * * the authority to create benefit districts rests solely with the Legislature, * * * their acts cannot be questioned because of want of notice; * * * * such acts are known as legislative enactments or legislative assessments, as the case may be."

The sentence from which this extract is made and the one preceding it in the opinion of Woodson, J., is as follows:

> "In answer to that contention it is sufficient to state that said division of the

road district into zones and the fixing of the percentage of benefits to the lands in each are legislative acts which cannot be questioned upon the ground of want of notice to the property owners.

"The reason for this rule, is that *the authority to create benefit districts* and the percentage of the benefits to be assessed *rests solely with the Legislature*, which, however, may delegate that authority to certain officers and institutions of the State, such as the common councils of the various cities of the State and the county courts of the various counties thereof, and so long as they act within their legislative authority *their acts cannot be questioned because of want of notice* in the absence of some charter, ordinance or statutory provision to the contrary. Such acts are known as legislative enactments or legislative assessments, as the case may be." The words in italics are those quoted by plaintiffs in error.

The Court did not hold that the land owner is not entitled to be heard upon the question of benefits, but on the contrary, expressly ruled that all defenses are open to him *in a suit upon the tax bill.* Neither did the court decide that he is not entitled under the statute to a *preliminary* hearing before the

county court when the district is organized, although such hearing would not be essential to the validity of the Statute.

As in City of St. Louis v. Richeson, 76 Mo. 486, the preliminary hearing and inquiry before the county court under the decision of the Supreme Court is not made conclusive, but is a sufficient basis for the subsequent proceedings. The Statute does not authorize any number of land owners to form a road district to embrace such territory as *they* choose to include in it. It cannot be so construed as to permit *them* to select the land to be taxed for highway improvement without regard to the benefits to the land included in the district. Every safe-guard is thrown around the organization and formation of such special benefit road district. The land owners desiring such organization must first present a petition to the County Court signed by the owners of a majority of acres of land to be included. Not only this, but the petition must further set out the names of the other owners who do not join in it, with the description of the lands belonging to each as far as known. The boundaries of the proposed district must be given; three weeks notice by publication in a weekly newspaper is required, and in addition thereto handbills must be posted. The notices are required to give full information not only as to the location of the proposed district and its boundaries, but also when the

petition will be heard by the County Court. Express provision is made in the Statute for remonstrances. The objecting land owner may join his neighbors in such remonstrance, or file one in his own behalf. The court may hear evidence upon the matter. Why all these preliminaries if the petitioning land owners are alone to be considered and their wishes to prevail?

Such was not the construction placed upon the Statute by the plaintiffs in error when the Kansas City & Liberty Boulevard Road District was formed. They filed their remonstrances, appeared before the County Court and introduced evidence showing that a real hearing was provided by Statute according to their construction.

The County Court is authorized by the Statute to change the boundaries as the public good may require. The only restriction is that no land not embraced in the notice shall be included without the consent of the owner or owners thereof.

It is submitted that the Statute does not authorize the formation of a road district by the owners of a majority of the acres of land within a prescribed territory. The matter is committed to the County Court, after due notice and an opportunity to all interested parties to be heard, and the court is required by the express terms of the Statute to exercise its judgment and discretion in fixing

the boundaries and in determining the land to be included within it.

Fallbrook Irrigation Dist. v. Bradley, 164 U. S., 369.

It is further argued that at the time the special benefit road district is organized it is not known what roads will be improved, and it is therefore impossible to determine the lands that should be embraced in the territory to be assessed with benefits.

The same may be said against most of the Statutes in the different States providing for irrigation, reclamation, levee districts, etc. General provision is made for the organization of the district and thereafter for the adoption of the plans.

If it be said that a district cannot be formed until the plans for the improvement are determined, the objection may be made that until the boundaries of the district are fixed, it is impossible to decide what improvement will benefit *all* the lands in it. So that under such a theory it would be impossible to form the district until the plan for the improvement is settled, and likewise impossible to fix the plan for the improvements until the district is marked out.

No such insuperable objection exists in practice, however. The statute provides that the County Court shall lay out the boundaries of the district after a hearing upon the petition and remonstrance

and may change the boundaries as deemed best. The County Court fixes the boundaries of the District. In contemplation of the Statute, and the County Court must have that in view, all land embraced within the boundaries is benefited by the improvement of the road, the extent of the benefit to be determined by the distance the land lies from such highway as may be improved.

> "In assessments or special taxes for county roads it is often provided that land within a certain distance of the road is to be assessed for the cost thereof. What this distance shall be depends largely upon the discretion of the legislature; it may be two miles, a mile and a half, or one mile."
>
> Page & Jones on Taxation by Assessments, Sec. 629.

In Hagar vs. Reclamation District, 111 U. S. 701, referring to reclamation districts, the court said:

> "All that is required in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefits received. Absolute equality in imposing them may not be reached—only an approximation to it may be obtainable. If no direct invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection

to the mode pursued that to some extent inequalities may arise."

But it is needless to pursue this inquiry further as under the construction given by the Supreme Court of Missouri to the Statute all defenses are open to the land owner when it is sought to reach and appropriate any part of his property to the payment of the benefits assessed for the improvement, and this is a sufficient answer to the objection that property is taken without due process of law.

It is respectfully submitted that the judgment of the Supreme Court of Missouri should be affirmed.

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CLAUDE HARWICKE,
Of Counsel.

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CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

W. S. Embree, Ellis Gittings, A. N. Gittings, et al., Plaintiffs in Error,
vs.
Kansas City & Liberty Boulevard Road District of Clay County, et al., Defendants in Error.
No. 187.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT.

A petition, signed by the owners of a majority of the acres of land to be affected, was filed in the office of the Clerk of the County Court of Clay County, in the State of Missouri, asking the organization of the "Kansas City and Liberty Boulevard Road District" in accordance with the Statutes of said State providing for the formation of what is known as "Special Benefit Assessment Road L tricts."

Notice was given by said clerk, by three publications in weekly newspaper printed in the County and by five hand bills put up at public places within the proposed district, of the presentation of said petition and of the date of the next regular term of the County Court of said County, at which the same would be heard. (Trans. of Rec. p. 24.)

It appears that two remonstrances were filed. In one of them some of the Plaintiffs in Error joined. The Record of the County Court (Trans. of Rec. p. 22) shows that the petition came on for hearing on the 8th of August, 1911, and recites the appearance of the petitioners, and sets out the boundaries of the proposed District, and adds the following:

> "And also comes Shubael W. Allen, who, on the 5th day of August, 1911, filed his remonstrance and protest against the formation or organization of such proposed public road district; and also C. T. Pritchard, J. W. Whitaker, Harry Stephens, James Stephens, Ellis Gittings and A. N. Gittings, who on the 7th day of August, 1911, filed their protest and remonstrance against the establishment of said proposed public road district; and it appearing to and being found by the Court that notice of the presentation of said petition, and of the date of the beginning of the next regular term of court at which the same

might be heard, were duly given by the Clerk of this Court in compliance with Article VII of Chapter 102 of the Revised Statutes of Missouri of 1909, said petition and said protests and remonstrances are taken up and heard and considered by the Court on this day, it being as soon after the first day of this term of the Court as the business of the Court would permit; *and the Court, after hearing and considering said petition and said protests and remonstrances and all evidence offered in support thereof; finds that the public good requires and makes necessary the organization, formation and creation of such proposed public road district prayed for by said petitioners and with boundaries as stated in said petition.*"

The preliminary order provided by statute was thereupon made by the County Court and three Commissioners appointed to represent said District and manage its affairs.

Thereafter a meeting of the land owners was held in accordance with notice duly given, and plans for the building of highways adopted and steps taken to assess the lands in the District to pay for the same and to issue bonds as authorized by the Statute.

The plaintiffs in error, land owners and citizens of said Road District, thereupon instituted this

suit to enjoin the assessment of their lands to pay for said Road improvement and to prevent the issue of the bonds of said District, as authorized at the public meeting held for the purpose of voting upon the proposition.

Plaintiffs' bill or petition sets up several grounds for the relief prayed, but only two are open for consideration in this court, i. e., that the Statute of the State of Missouri providing for the organization of said Special Assessment Districts denies to the land owner due process of law, first: because there is no provison by which he can be heard upon the question of benefits to his land and whether the same should be included within the special district; and second, because the Statute delegates to three commissioners the right to assess the lands within the district and no hearing is accorded the land owner by which the valuation so assessed can be corrected or reviewed.

The trial court upheld the validity of the Statute and found that the proceedings were regular and dismissed the plaintiffs' bill or petition, as it is called in the Missouri practice. An appeal was taken to the Supreme Court of Missouri, where it was heard before the Court sitting in banc.

Upon the first hearing three separate opinions were delivered (Trans. of Rec. 26-41), but the plaintiffs' contention here were not sustained in any of them. The bonds were held invalid, but upon other grounds than those urged in this Court.

A rehearing was granted by the Supreme Court of Missouri. The case was re-argued before that tribunal. The court, upon this heairng, construed the Statute to provide, as the only means for collecting the special assessment against the lands in the road district, a suit upon a tax bill for such assessment, to be prosecuted in the ordinary courts of justice after the usual process served upon the land owner as in other cases; and further, that all defenses were open to the taxpayer in such suit.

Upon this construction of the Statute, the Court declared that there was no merit in either of the points now urged by the plaintiffs in error.

The other grounds for relief set up by them were also held untenable and the judgment of the lower court dismissing the bill was affirmed.

For the convenience of the court, the sections of the Statute that may have any bearing upon the questions for determination will be set out in full, to-wit:

"ARTICLE VII.

"SPECIAL ROAD DISTRICTS, BENEFIT ASSESSMENTS.

"Sec. 10611. COUNTY COURT MAY FORM DISTRICTS.—County Courts of the several counties of this state may divide the territory in their respective counties into road districts, and every such district organized according to the provisions of this article shall be a body corporate and possess

the usual powers of a corporation for public purposes, and shall be known and styled ".....road district of ..... county," and in that name shall be capable of suing and being sued, of holding such real estate and personal property as may at any time be either donated to or purchased by it in accordance with the provisions of this article, or of which it may be rightfully possessed at the time of the passage of this article, and of contracting and being contracted with as hereinafter provided. Said district shall contain at least six hundred and forty acres of land of contiguous territory and may be commensurate with a municipal township, and if laid out along any thoroughfare may be of any length deemed necessary and advisable except that every district shall be included wholly within the county organizing it. (Amendment 1911.)

"Sec. 10612. PETITIONS — NOTICES — REMONSTRANCES — ORDER OF COURT.— Whenever a petition, signed by the owners of a majority of the acres of land within a district proposed to be organized, and setting forth the proposed name of the district, and giving the boundaries thereof and the number of acres owned by each signer, and the whole number of acres embraced therein, and the names of other owners of land in said district so far as known, and the number of acres owned by each so far as known, and praying for the organization of such public road district in

accordance with this article, shall be filed in the office of the clerk of the county court thirty days before the beginning of the next regular term of said court, the said clerk shall give notice by at least three publications in some weekly newspaper printed in the county and by at least five handbills put up at public places within the district, of the presentation of said petition, and of the date of the beginning of the next regular term of the county court at which the same may be heard. Said notices shall contain the names of at least three signers of said petition and set out the boundaries of said proposed district, and shall notify all owners of land in said proposed district who may desire to oppose the formation thereof to appear on the first day of such regular term of court and file their written remonstrance thereto. All land owners owning land within the proposed district may join in one remonstrance, or each such owner may file his separate remonstrance and each remonstrance shall be in writing, and shall state specifically and separately the objection or objections of the remonstrators to the formation of said proposed road district, and shall be filed in said court with the clerk thereof on or before the first day of said regular term. On the first day of said term of court, or as soon thereafter as its business will permit, the court shall hear such petition and remonstrance, and shall make such change in the boundaries of such proposed district as the

public good may require and make necessary, and if after such changes are made it shall appear to the court that such petition is signed or in writing consented to by the owners of a majority of all the acres of land within the district as so changed, the court shall make a preliminary order establishing such public road district, and such order shall set out the boundaries of such district as established. If no remonstrance shall have been filed, the court shall determine whether such petition has been signed by the owners of a majority of the acres of land in the district, and if so, shall establish the district with the boundaries given in the petition, or with such boundaries as may be set forth in an amended petition signed by the owners of a majority of the acres of land affected thereby; and such amended petition may be filed at any time before the making of the preliminary order establishing a road district, but the boundaries of no district shall be so changed as to embrace any land not included in the notice made by the clerk unless the owner thereof shall in writing consent thereto, or shall appear at the hearing, and is notified in open court of such fact and given an opportunity to file or join in a remonstrance. (Laws 1905, p. 282.)

"Sec. 10613. COMMISSIONERS, HOW SELECTED.—At the term of court in which the preliminary order is made, or at any subsequent term thereafter, the said court shall appoint three com-

missioners, who shall be owners of land within the district, who shall hold their office until the first Tuesday after the first Monday in January thereafter; and on said date the land owners in said district, at an hour and place to be fixed by said commission, shall elect three commissioners, one of whom shall serve for one year, one for two years and one for three years, and on the first Tuesday after the first Monday in January each year thereafter they shall elect a commissioner to take the place of the one whose term is about to expire, who shall serve three years. Any vacancy caused by resignation, death, removal from the county of a commissioner or sale of all land owned by him in the district shall be filled for the unexpired term by election by the land owners of the district. All commissioners shall qualify by taking, subscribing and filing with the county clerk the oath prescribed by the Constitution of this State, and that they will faithfully, honestly and impartially discharge their duties as commissioners according to law. If for any reason the board of commissioners hereinbefore mentioned shall fail to call an annual or other prescribed election to fill a vacancy or vacancies caused by the expiration of the term of any one or more of the commissioners, then the county court is hereby authorized and required to call an election to fill said vacancy and to fix the time therefor within

fifteen days after making the order for said election. (Laws 1905, p. 282, amended, Laws 1907, p. 418.)

"Sec. 10614. COMMISSIONERS SHALL ORGANIZE, WHEN—HOW.—The commissioners so appointed and qualified shall meet at such time and place within such district as may be fixed by the county court at the time of appointing them, and shall organize by electing one of their number president, another vice-president, and another secretary: Provided, that by a unanimous vote of said commissioners any person not a member of said board may be chosen secretary. Regular meetings of said board shall be held at such time and place as the board by resolution previously adopted may determine. The treasurer of said board shall be the county treasurer, and he shall be responsible on his bond for the faithful keeping of all moneys deposited with him by reason of this article. The president of the board shall preside at all meetings thereof; he shall sign the minutes and records of the board, and all warrants that may be drawn upon the treasurer by order of the board for the payment of any money out of the treaury on account of the funds belonging to said district, and exercising a general supervising control over the work of such commission, and in general may do all the acts and things that the said board may empower him to do; and in his absence from any regular meeting the vice-president shall preside and perform all the

duties herein conferred upon the president. The secretary shall carefully keep a true and complete record of the proceedings of said board in a book to be procured for that purpose, and the minutes of each meeting of said board shall be signed by the presiding officer and attested by the secretary, and by the secretary transcribed in said record book. Except when otherwise by this article directed, the secretary shall draw all warrants on the treasurer for all moneys ordered by the board to be paid out of the district fund, and perform such other acts and duties as may be prescribed by said board. (Laws 1905, p. 282.)

"Sec. 10615. COMMISSIONERS TO FIX VALUATIONS ON LANDS—OTHER DUTIES.—The said Commissioners shall fix a fair and impartial valuation on each tract of land within said district independent of the buildings thereon, and make a tabulated statement or chart of such valuations, according to the numbers of the lands, names of owner if known, and by the word "unknown" if not known, and indicate therein what tracts lie within one mile of the road proposed to be improved, and what at a greater distance than one mile and less than two miles, and what at a greater distance than two miles, and where it is proposed to improve more than one road, there shall be a separate tabulated statement for each road. Said statement of valuations shall be signed by said commissioners

and acknowledged by them: *Provided*, if said commissioners cannot agree upon the valuation to be placed upon any tract of land in the road district, they shall call in the county assessor (or township assessor where counties are under township organization) to fix a valuation upon said tract, and his valuation shall be final, and said commissioners shall in their tabulated statement indicate any tract whose valuation was fixed by any such assessor. They shall thereupon request the county surveyor or bridge commissioner to draw up estimates of the costs of any road to be improved, and if no such engineer can be so furnished, they shall employ one at a compensation to be fixed by them and for such a time as they may determine. Said engineer, under the direction of the commission, shall make estimates of the cost of macadamizing, graveling, grading, filling, tiling, or otherwise improving or constructing any road in said district designated by said commission to be improved, and in aid of such estimates the commission may previously, by correspondence or otherwise, obtain from any railroad its lowest charges for shipping by the car load gravel, tiling, sand, rock or other material needed in the improvement of any such road, and also from any owners of quarries or gravel beds or the producers or manufacturers of any materials deemed necessary for the proper construction or grading or improving of a road,

prices at which the same may be bought. The engineer shall make a report, accompanied by maps and profiles, of the roads proposed to be constructed or improved, specifying therein what road or what portion of each road should be macadamized, and what graded, and what filled, and what tiled and what graveled, and what otherwise improved or constructed, and the character of the work required for making every part a permanent road, and separate estimates of the cost of each portion, and if a permanent road can be made of any portion by the use of one or more materials or methods of construction, then separate estimates of the cost of each. Unless said commission shall otherwise direct, said report shall contain separate tabulated statements and estimates of the cost of all the roads and of each road proposed to be improved, according to the material used, and the proportionate cost that would be chargeable against each separate tract of land in the district for each separate road, and for the whole, according to such valuation, if all were paid at once, and the amount that would be payable yearly if that charge were distributed equally through five years or if equally distributed through twenty years. Each tract of land within one mile of any road to be improved shall, in making up of such estimates, be charged in proportion to the valuations fixed thereon as above directed, and each tract at a greater distance than one mile and

less than two miles from any such road in proportion to seventy-five per cent of such valuations, and each tract at a greater distance than two miles from said road in proportion to fifty per cent of such valuations; and in determining the share of any tax bill or bonds any tract of land in said district should bear, the county clerk shall be guided by the same rule of apportionment. Said tabulated statement of valuations, and said engineer's estimates and apportionment, together with the maps and profiles, when made to the satisfaction of said commission, shall be filed with the president or secretary, and shall from the date of their filing be open to the inspection, under proper regulations, of all owners of land within the district. (Laws 1905, p. 282.)

"Sec. 10616. MEETING OF LANDOWNERS, HOW CALLED—PROPOSITIONS TO BE SUBMITTED.—Upon the filing of said tabulated statements of valuations and said reports, maps and profiles, the board of commissioners shall call a general meeting of the landowners of said district at some convenient place therein, and shall give at least twenty days' notice of the time and place of such meeting and the purpose thereof, by at least ten printed or written handbills put up in public places therein and by at least three publications in a weekly newspaper published in said county. At such meeting the board of commissioners shall submit the report containing the estimates, together

with the maps and profiles, made by the engineer, to the land owners for examination and explanation, and shall take a *viva voce* vote of the land owners present on the following propositions:

First: Shall the roads mentioned in said report be constructed or improved according to any of the plans and out of any of the materials therein set out and the costs thereof charged against the lands in said district?

Second: What materials shall be used in constructing or improving said road or roads?

Third: Shall the cost be paid (1) at once, or (2) fix and determine the number of years, not to exceed twenty, through which costs shall be distributed.

Each land owner shall have as many votes, on every proposition, as he owns acres of land in the district. For a determination of the first proposition in the affirmative the vote of the owners of a majority of the acres of land in the district shall be necessary; for a determination of the second and third propositions, what materials shall be used and what term of payment be decided upon, which receives the affirmative vote of a majority of the acres of land represented by land owners present and voting. In determining the first proposition the land owners may determine by one vote to construct or improve all the roads proposed by the commissioners for construction or improvement, or

may vote for each road separately." (Amended Laws 1911, p. 373.)

Sec. 10617. AFTER VOTING UPON PROPOSITIONS, FURTHER DUTIES OF COMMISSIONERS.—If the owners of a majority of the acres of land in such district shall vote in favor of constructing or improving any of the roads in said report mentioned and to charge the cost of said work against the lands in said district, then the said commissioners shall make out and sign and acknowledge, in the manner that conveyances of real estate are by law required to be acknowledged, a report of the action of said land owners at said meeting, and file the same with the clerk of the county court, and said clerk shall enter the same upon the records of said court, and from the filing of said report said public road district, by the name mentioned in the preliminary order of the court establishing it, shall be a political subdivision of the state for governmental purposes with all the powers mentioned in this article and such others as may from time to time be given it by law. If, however, the owners of a majority of the acres of land in said district do not vote to construct or improve any of the roads proposed by said commissioners and to charge the lands therein with the cost thereof, then said commissioners shall so report to the county court, and the court shall make an order rescinding its former preliminary order

establishing said road district, and shall order all the costs incurred by said petitioners and commissioners to be paid out of the general road fund of the county, and said commissioners shall file an itemized statement of such costs with said court; and thereafter for two years it shall be incompetent for the county court to entertain any petition for the establishment of a public road district with the same or practically the same boundaries. (Laws 1905, p. 282.)

Sec. 10618. PLANS AND SPECIFICATIONS —CONTRACTS.—Whenever any road district shall have been established as in the preceding sections of this article prescribed, the said board of commissioners shall notify the state highway commissioner, and he shall send, or if he cannot do so, then the board of commissioners of the district shall employ, a competent engineer and road builder to draw up plans and specifications for the construction or improvement of the road or roads, and of the material to be used and the grading or filling to be done, according to the vote of the land owners as in section 10616 directed, and said specifications, after having been approved by said commission, shall be filed with said commission, and thereupon the board of commissioners shall, in the name of said road district, enter into a written contract with the lowest and best bidder for the doing of said work according to said specifications. Said con-

tract shall require said work to be completed within a certain time, and shall provide a penalty for each day beyond said time said work remains uncompleted, and said commission shall require said contractor to enter into a bond, to be approved by said commission, for the full performance of said contract. Said commission may advertise for bids for such contract in any method that to them may seem necessary, but said contract shall in no case be let to any commissioner, nor shall any commissioner, directly or indirectly, have any pecuniary interest therein other than the performance of his official duties as herein required. Said contract shall in no case provide for the payment of a sum of money in excess of the estimates voted upon at the land owners' general meeting, plus ten per cent. thereof. (Laws 1905, p. 282.)

Sec. 10619. SPECIAL TAX BILLS, ETC.—If at the general meeting of land owners it was directed that the entire cost of said work shall be paid by one assessment, the contract shall provide for the payment of said work by special tax bills issued against the land in said district, and the said commission, on the completion of said work and the acceptance thereof by them, shall make out and certify to the county clerk a statement of the contract price, less any penalty that may be assessed against said contractor for failure to finish the work within the time prescribed by the con-

tract, and a description by number of each tract of land in said district lying within a distance of one mile of the road to be improved, and each tract at a greater distance than one mile and less than two miles, and each tract at a greater distance than two miles, and the number of acres in each tract, and the record owner thereof if known, and the valuations fixed thereon by said commission and acknowledge said certificate in the way that conveyances of real estate are required by law to be acknowledged, and file the same with the county clerk. The county clerk shall thereupon apportion to each tract its share of the costs of said improvement and make out separate special tax bills against each tract for the amount apportioned it, as in section 10615 of this article directed. A tax bill shall be for the entire amount apportioned against a tract of land within said district, shall be payable within sixty days from issue, shall bear interest from maturity at a rate of six per cent per annum, and in addition shall provide for a penalty of one per cent per month for each month it remains unpaid after it has been due one year. It shall be made payable to the order of the contractor, and shall contain a description according to government survey of the tract of land against which it is a charge, and the name of the record owner thereof, but any mistake in the name of the owner shall not invalidate a tax bill. Tax bills shall run in

the name of the road district for which issued, shall be signed by the president of the board of commissioners and attested by the county clerk as such, shall be numbered, and shall be delivered to the contractor or his agent, and shall be accepted by said contractor as full payment for the work done by him. Any such tax bills shall be a lien on the land described therein, and if not paid when due, the legal holder thereof may sue thereon in the circuit court at any time within two years thereafter and recover judgment for the amount thereof, with interest and penalty and costs, and such judgment shall be made a lien against the land described therein, and a sale thereunder shall carry the title and interest in said land of every person who has, according to law, been made a party to such suit. The county clerk, before such tax bills are delivered, shall enter in a book to be denominated "Special tax record of ————road district" a description of said tax bills by number, amount, payee, date of issue and maturity, and by numbers of the land and by the name of the owner, if known, or by the word "unknown," if not known. Said record book shall be kept in the office of the county clerk, and a duplicate thereof shall be made by him and deposited with the county treasurer, and he shall give to the owners of each tract of land, if known, or if not known, to the occupier thereof, a notice of the amount due on such tax bill and when due. The owner of

any tract of land so charged may pay the amount thereof to the county treasurer, and receive from him duplicate receipts therefor, one of which may be kept by himself and the other presented to the county clerk, who shall, on presentation of said receipt, enter free of charge a discharge of such tax bill opposite the description of the land against which the same was assessed in his special tax record, and whenever payment of the amount due on any such tax bill shall be made to the legal holder of any such tax bill, the owner of the land, by presentation of such tax bill to the county clerk, may in like manner have such land discharged from any further claim or lien of such tax bill. Whenever as much as one hundred dollars shall be in the hands of the county treasurer as a result of the payment of any such tax bills, the county clerk, on a deposit with him of the tax bills for the payment of which such moneys were paid to the treasurer, shall draw his warrant on the county treasurer for ninety-nine per cent of the amount thereof, payable to the legal holder of such tax bill, and the county treasurer shall pay such warrant and retain the remaining one per cent as his commission for collecting and paying out such money, and the county clerk shall cancel such tax bills and return them by mail to the owner. The county clerk shall be paid for his services rendered under this section fifty cents for each tract of land in said district, and ten cents for each tax bill

issued, to be paid by the person to whom such tax bills were issued before delivery thereof. (Laws 1905, p. 282.)

Sec. 10620. INSTALLMENT ASSESSMENTS. When the land owners, in general meeting as prescribed in section 10616, shall direct that the cost of the construction or improving any road shall be distributed through a number of years not to exceed twenty, and shall fix and determine such number, the board of commissioners shall issue the bonds of the road district for the length of time by said meeting directed, and in an amount not to exceed the estimates submitted to said meeting, plus ten per cent. thereof, and enter into a contract for the construction of said road as directed in sections 10618 and 10619 of this article, except that said contract shall provide for a payment of said work in money instead of special tax bills: *Provided*, that said commission may use said bonds, or any part thereof, at par in payment for said work. Said bonds shall run in the name of said road district and shall bear not to exceed six per cent. interest, and shall be payable at the end of the time indicated by the land owners at their general meeting, and shall contain a provision that they may be paid by number at any time after one year on the call of said board of commissioners filed with the county clerk. Said bonds shall be signed by the president of said road district and attested by the county clerk, who shall,

before the delivery thereof, register the same in a suitable book for that purpose. Whenever the board of commissioners shall sell any bonds for any work to be performed under this article, the money paid therefor shall be paid to the county treasurer, who shall enter the same to the credit of said road district and shall be responsible on his bond for the faithful keeping thereof, and shall pay the same out on warrants drawn by said board of commissioners. The board of commissioners shall make out and certify to the county clerk a statement of the amount of the bond issue, and a description by number of each tract of land in said district lying within a distance of one mile of the road to be improved, and of each tract at a greater distance than one mile and less than two miles, and of each tract of a greater distance than two miles, and the number of acres in each tract, and the valuation placed thereon by them, and acknowledge said certificate in the way that conveyances are required by law to be acknowledged, and file the same with the county clerk. The county clerk shall thereupon apportion to each tract, according to the rule prescribed by section 10615, its share of said bond issue, principal and interest, stating each separately, the interest being the amount necessary to pay the interest on the bonds as it annually becomes due, and shall enter the same in a book to be denominated "bond tax record of ——— road district," and shall append

his certificate thereto as county clerk, and from said date such apportionment shall be a charge against the tracts of land indicated until paid. The county clerk shall on each successive year make out a duplicate of so much of said bond record as will indicate the portion of said charge each tract is to pay for that year, principal and interest, and deposit said duplicate record with the collector of revenue of the county or with the collector of revenue of the township or townships in which the road district may lie according as such county may or may not be under township organization, and said collector shall annually make out separate tax bills against each tract of land for the amount shown by the duplicate book deposited with him to be due and collect the same as he collects direct taxes levied for any governmental purpose, and in the same manner receipt for the same. Said tax bill shall contain the name of the person shown by the records to be the owner thereof, and if not paid on presentation shall bear one per cent interest from the first day of the following January for each month the same remains unpaid, and if not paid within six months of said date may be recovered by a suit brought to the use of the collector of the revenues of the county, and in such suits the same commissions shall be allowed to the tax attorney of the county as are allowed for bringing suits for the collection of delinquent taxes, and such suits may be brought as such suits

for taxes may by law be brought, and in such cases the tax bill shall be *prima facie* right of the plaintiff to recover. A judgment in such suit shall be made a lien on the land described in the tax bill, and a sale thereunder shall carry all the title and interest in said lands of every person who has according to law been made a party defendant to such suit. The collector shall deposit all moneys by him collected on said tax bills with the county treasurer within one month after having collected the same, and shall in all cases be chargeable on his bond for the faithful performance of his duty, both in collecting said tax bills and in depositing the money collected, and upon his failure to perform his duty in said regard it shall be the duty of said board of commissioners to cause suit to be brought against him on his bond in the name of the state of Missouri to the use of said district. The collector shall receive the same fees for collecting such tax bills that he is allowed by law for collecting taxes against real estate, to be retained by him out of the money so collected. The collector shall issue a receipt to the owner of the land paying any such tax bill, and on presentation of any such receipted tax bill to the county clerk, the clerk shall mark the tract of land against which the same was charged discharged therefrom, and the collector shall in like manner in the duplicate of the record in his possession enter such discharge whenever he collects

the money due on any such tax bill. It shall be the duty of the board of commissioners, as often as a sufficient amount of money is in the hands of the county treasurer arising from the payment of such tax bills, to file with the county clerk a call for so much of the unpaid bonds as said amount of money will pay, and the calls shall be for the bonds bearing the lowest numbers, and from the filing of such call all interest on any bonds called for shall cease, and as soon as any bond shall be deposited with the clerk after said call and in accordance therewith the board of commissioners shall issue a warrant on the county treasurer to pay the same, and the county clerk shall mark the same cancelled and return it to the treasurer for safe-keeping, and enter a memorandum in the bond record of such payment; for all the services rendered by the county clerk and the county treasurer in the performance of the duties by this section imposed, they shall be paid out of the general road fund of the district such sums as the county court may determine and direct." (Amended Laws 1911, p. 374.)

The other sections—10621 to 10625, inclusive—do not pertain to matters involved here. A summary of the statute and an analysis of the provisions of the different sections is set out in the statement of the case made by the Supreme Court of Missouri. (Trans. of Rec. 42.)

POINTS AND AUTHORITIES.

I.

This court will adopt and follow the construction given by the Supreme Court of Missouri to the statute of that state under consideration in this case.

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61.

Weightman v. Clark, 103 U. S. 256, 260.

Chicago, Milwaukee & St. Paul Ry. Co. v. Iowa, 233 U. S. 334.

II.

The Supreme Court of Missouri, in construing the statute of that state under review in this case, held that the only method provided for the collection of taxes assessed for the benefits to the lands in the road district is by suit upon tax bills in the ordinary courts of justice, and that in said suit all the defenses the land owner may have, from the inception of the proceedings to the judgment upon the tax bill, may be interposed.

Embree v. Road District, 257 Mo. 593, 611.

III.

The Supreme Court of Missouri, having construed article VII of chapter 102, R. S. 1909, of the statutes of said state, as amended in 1911, providing for the organization of special benefit assessment road districts, to require the enforcement of the tax assessed upon lands in said district, by suit upon a tax bill in a court of competent jurisdiction, with proper service of process upon the land owner, as in ordinary actions, with all defenses against said tax open to said land owner, said statute does not deny due process of law and is not in conflict with the fourteenth amendment of the Federal Constitution.

Embree v. Kansas City and Liberty Boul. Rd. Dist., 257 Mo. 593;

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701;

King v. Portland, 184 U. S. 61;

Walston v. Nevin, 128 U. S. 578;

Londoner v. City and County of Denver, 210 U. S. 373, 385;

Davidson v. New Orleans, 96 U. S. 97;

Paulsen v. City of Portland, 149 U. S. 30;

City of St. Louis v. Richeson, 76 Mo. 486.

IV.

While the Supreme Court of Missouri, after holding that the land owner is entitled under the statute to make any and all defenses he may have in a suit upon the tax bill, did not go further and decide his right to be heard in the first instance in opposition to the organization of the district and to the inclusion of his land in the territory to be assessed for benefits for road improvements therein, the statute clearly provides for notice to the land owners and an opportunity for a preliminary hearing upon these issues before the county court, and such hearing was, in fact, accorded to the plaintiffs in error in this case, as provided by the statute.

Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112;

Davidson v. New Orleans, 96 U. S. 97.

ARGUMENT.

This Court will accept the construction placed by the Supreme Court of Missouri upon the statute of that state, in determining whether it affords due process of law in providing for the organization of special benefit road districts and the manner in which the lands within said districts shall be assessed and the taxes collected for the improvement of the public highways therein.

Article VII, Chapter 102 of the Revised Statutes of 1909, empowers the County Courts of the several counties of the State to divide the territory in their respective counties into Road Districts, each of which, under the amendment of 1911, must contain not less than 640 acres of contiguous territory.

In order to authorize the formation of a Road District under this Act, a petition, signed by the owners of a majority of the acres of land within the territory proposed to be organized into a Special Road District, setting forth the name of the District, giving the boundaries thereof, the number of acres owned by each signer, the whole number of acres to be embraced in the proposed district, the names of the other owners of land, and the number of acres owned by each as far as known, and praying for the organization of such public road dis-

trict, must be filed with the Clerk of the County Court. The Clerk is then required to give notice of the presentation of the petition and of the date when it will be heard by said Court, by three publications in a weekly newspaper and by posting five handbills in public places within the proposed district.

The notice must contain the names of at least three petitioners and set out the boundaries and notify all the owners of land who desire to oppose the formation thereof to appear on the first day of the Regular Term and file their written remonstrance thereto.

The statute then provides that objectors may join in one or each may file a separate remonstrance, setting out specifically the objections to the formation of the district.

The County Court must hear the petition and remonstrance and may make such changes in the boundaries of the proposed district as the public good may require and may include other lands therein with the consent of the owners thereof, and if the court finds that all the proceedings are regular and that the territory should be organized as a special road district, a preliminary order to that effect may be made and three commissioners appointed to administer its affairs until an election can be held.

Provision is then made for a meeting of the land

owners, and the submission to a vote of plans for road improvement, with the cost thereof, and the time within which payment shall be made for the same. If the owners of a majority of the acres of land in the district vote to adopt the plans and incur the cost, the district becomes entitled to all the corporate rights provided by the Statute.

The lands must then be valued by the commissioners and a proper report filed with the County Clerk, and when bonds are authorized the taxes for the improvement are payable in annual installments during the twenty years the bonds have to run. The bonds are not general bonds of the District, but are payable only out of the special taxes upon the land.

The Legislature provided further that the taxes upon lands within one mile of any improved road within the district should be levied upon the full value thereof; upon lands a mile from the road and less than two miles, at seventy-five per cent of its value; and on lands within the district more than two miles from the improvement, at fifty per cent of its value.

The method of collecting these taxes provided by Statute is by suit in a court of competent jurisdiction upon tax bills, with service of process upon the land owner, as in ordinary cases.

The Supreme Court of Missouri, in the statement accompanying its opinion in this case, makes a

full and complete summary of the Statute and the provisions contained in the various sections thereof (Trans. of Rec. 42-47.) It is sufficient, however, for the purposes of this argument to set out here the statutory provisions for the organization of the district, and in general terms the plan for the assessment and collection of the taxes upon the land.

The construction placed upon the Statute by the Supreme Court of Missouri requires suit to be brought upon the tax bills in a court of competent jurisdiction; and further that this is the only method provided by the Act for the collection of these assessments or the appropriation of any part of the land owners' property to the payment of the public improvements authorized by the Act.

The Court, in discussing the contention of plaintiffs in error, that the Statute violates the provision of the Fourteenth amendment, declaring that no person shall be deprived of his property without due process of law, said:

> "The only procedure prescribed by said Article 7 for the collection of these benefits is Section 10620, previously mentioned, which only authorizes their collection by suit in the Circuit Court."

The Court further held that "*in such suit, all legal defenses the property owner may have from the inception of the proceedings down to the rendition of the judgment by the Court on the tax bills may be*

pleaded and contested in the same manner as any legal or equitable defenses may be made in any other action at law or in equity."

This construction of the Statute is reiterated in discussing the *further* contention of the plaintiffs in error that no opportunity is given by the act to contest the *apportionment* of the taxes to the different tracts of land, where the court says (page 615):

> "The second objection before mentioned, namely, that while it may be conceded that the division of the districts into zones and the fixing of the percentage of benefits to the lands in each zone may be legislative acts, yet, the valuation of the lands by the board of commissioners in each and all of the zones, upon which the percentage of benefits is to be based, was not made or fixed by the Legislature, but by said board, and is therefore subject to question by the property owners in each and all of them, and if not afforded that right then the proceedings would result in taking their property without due process of law.
>
> "It must be conceded that if appellants' major premise is true, then the sequence must necessarily follow. But is the major premise true? I think not, for the reason, as before stated, namely, that

> each and all property owners within the district, who considered himself or themselves aggrieved by the valuation of his or their lands by the board of commissioners, are offered an opportunity for a full hearing upon that question in the circout court *when suit is brought upon the tax bill*, which cannot be collected in any other manner."

The law is well settled by many decisions of this Court, as well as by decisions in the highest courts of many of the States, that when taxes must be collected by suit, and the taxpayer is allowed to make any and all defenses that he has in such suit, due process of law is not denied him because he may not have had notice of and an opportunity to be heard at each and every step previously taken in the levy and assessment of such taxes. A wide discretion is allowed to the State in the manner of assessing and collecting taxes. The various steps to be taken are matters to be determined by the State, and the only question for consideration here is that of "due process of law." It is not enough to say that the Statute is not workable; that it may produce hardships; that it would be better if provision had been made for a hearing before the contract for the improvement was let, or the bonds sold.

As stated by Justice Field in Mobile Co. v. Kimball, 102 U. S. 691:

> "This Court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive State legislation."

If, however, it was necessary to defend the Statute, it could be readily shown that it is neither unusual nor improper to permit the taxpayer to contest the validity of an assessment in a suit upon the tax bill. It is almost universally true that a tax bill for municipal improvements is not issued until after the contract is let and the public improvement is completed. Frequently the special taxes for the improvement is payable in installments, but the property owner nevertheless has open to him the right to contest the validity of the proceedings in a suit upon such tax bills. The fact that under the special benefit road Statute the contract may be let for the improvement and the bonds issued before suit can be brought upon the tax bill, will not defeat the Statute, on the ground that it does not afford due process of law. The taxpayer's property is not taken or appropriated *until he is adjudged to pay the taxes* and the tax does not become a finality until that time. Under the construction of the Supreme Court of Missouri, he may set up in the suit upon the tax bill "any legal or equitable defense" that he has.

The suggestion that the assessment of the land is made by officers who are land owners in the dis-

trict and whose property is also subject to taxation, furnishes no ground of objection in this case. It may be said, generally, that municipal officers of all grades are taken from the citizens and property owners of the municipality, and the fact that valuations are fixed by land owners whose property is also subject to assessment furnishes no ground of Federal jurisdiction.

Hibben v. Smith, 191 U. S. 310.

Due process of law as demanded by the Fourteenth Amendment does not prohibit the division of the assessment into twenty annual payments. It is not to be assumed that an assessment adjudged to be illegal and invalid in a suit for one installment will be open to subsequent litigation between the same parties upon the same questions, nor is it at all probable that in a suit to collect an assessment the land owner will not avail himself of the right of an equitable defense to remove any cloud upon his title. The fact that a suit involves costs and the other incidents of ordinary litigation will not take it out of the category of due process.

McMillan v. Anderson, 95 U. S. 37.

But the inquiry here is not whether the legislation is wise or unwise, or whether a different scheme would not be an improvement upon the plan adopted by the Legislature, nor is it sufficient to invalidate the statute that inequities might arise in its enforcement. The State Supreme Court having con-

strued the Statute to require suit upon the tax bills as the only mode to enforce assessments for benefits upon the land, with the opportunity to interpose in such suit all defenses the property owner may have "from the inception of the proceedings down to the rendition of the judgment of the court on the tax bill," the question recurs: Is this due process of law?

No part of the taxpayers property can be actually appropriated to pay for the improvement until after the judgment is rendered against him in a suit in which all legal and equitable defenses to the proceedings may be made.

In Davidson v. New Orleans, 96 U. S. 104, Mr. Justice Miller, delivering the opinion of the Court, said:

> "That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be

> said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.
>
> * * * * * It is not possible to hold that where by the laws of the State the party aggrieved has, as regards the issues affecting his property, a fair trial in a court of justice, according to the modes of proceeding applicable to such cases that he has been deprived of that property without due process of law."

The same principle was announced in Walston vs. Nevin, 128 U. S. 578.

In Hagar vs. Reclamation District, 111 U. S. 701, the court, speaking of the question now under discussion, said:

> "In some States, instead of a Board of Revision or Equalization, the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; *or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it.* In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment, which can be deemed essential to render the proceedings due process of law."

In King vs. Portland, 184 U. S. 61, Mr. Justice McKenna quotes with approval the statement:

> " 'So it has been held that it is sufficient if the party is accorded the right of appeal or to be heard upon an application for abatement, * * * * * *or the assessment is to be enforced by a suit to which he is to be made a party* * * * *, or the right of injunction against collection is accorded, by which the validity of the assessment may be judicially determined. * * * In such case he cannot be heard to complain that his property is being taken without due process of law.' "

Mr. Justice Gray, in Spencer vs. Merchant, 125 U. S. 345, held:

> "Where a hearing is given by the taxing Act as to the apportionment among the land owners which furnishes to them an opportunity to raise all pertinent and available questions and to dispute their liability or its amount, and extent, such hearing was sufficient and the act in that respect was constitutional."

This rule was reiterated in Fallbrook Irrigation District vs. Bradley, 164 U. S. 112.

The Supreme Court of Missouri in the City of St. Louis vs. Richeson, 76 Mo. 470, 486, in a case where an improvement had been made and tax

bills issued against the property chargeable with benefit assessments, said:

> "We do not mean to say that this assessment of benefits is of itself inoperative and without any effect whatever; but what we mean to hold is that whilst it is valid, as a preliminary inquiry, and while the tax bill issued thereon is good as the basis for the suit directed to be instituted thereon, yet it does not have, and was not intended to have, any binding or conclusive effect against the party when thus sued. Such, manifestly, is the interpretation put upon the charter by the city itself, in the institution of this suit. If the charge was incontestably imposed, or its amount conclusively ascertained by the original proceeding, why ask the court by its order to establish the one or find the other? Yet such is the prayer of the petition. Whether it would have been better for the charter to have required that this inquiry should have taken place in the original proceedings in the Circuit Court, after due notice thereof, or as now provided, in this suit to enforce and collect the tax bill, was matter for the legislature, and is no concern of ours."

In Saxton National Bank v. Carswell, 126 Mo. 436, it was held that all defenses were open to the taxpayer in a suit upon the tax bill, and following Davidson v. New Orleans, 96 U. S. 97, and Hagar v. Reclamation District, 111 U. S. 701, the court held that this afforded due process of law.

The opinion of the Supreme Court of Missouri, by Woodson, J., so aptly puts the propositions involved that all that part of the opinion pertaining to the Federal question is inserted:

OPINION.

I.

Counsel for appellants first insist that the judgment of the Circuit Court was erroneous because the taxes levied against their property, under and by virtue of Chapter 102, Article 7, R. S. 1909, are illegal, for the reason that said article authorized said levy without notice to them, and therefore authorizes the taking of their property in violation of Sections 21 and 30 of Article 2 of the Constitution of this State, and Section I of the Fourteenth Amendment of the Constitution of the United States.

These constitutional provisions, in substance, provide, (1) that private property shall not be taken for public use without just compensation, and (2), that no person shall be deprived of his property without due process of law.

There is absolutely no merit in either of these contentions.

Regarding the first: This Court, from its earliest history down to this time, has uniformly held that special taxes or benefits, such as were levied against appellants' property, under said article 7, are not public taxes within the meaning of the Constitution authorizing the levy and collection of taxes for public or governmental purposes, but are special taxes assessed against the property for the payment of the improvements made upon the highways in the vicinity of the property, which in legal contemplation adds to the value of the property as much or more than the amount of the taxes imposed.

It would serve no good purpose to cite authorities in support of this ruling, save the case of Ranney v. the City of Cape Girardeau, not yet reported, wherein many of the cases so holding are cited by Judge Lamm.

Attending the second: This contention is also untenable for the reason that this court and the Supreme Court of the United States have repeatedly held that where these special benefits are levied, and no provision is made for the property owners to be heard during the proceedings imposing the special benefits, and where they are only collectible by suit, as in the case at bar, then all legal defenses the property owners may have,

from the inception of the proceedings down to the rendition of the judgment of the court on the tax bills, may be pleaded and contested in the same manner that any legal or equitable defense may be made in any other action at law or in equity.

The only procedure prescribed by said Article 7 for the collection of these benefits is section 10620, previously mentioned, which only authorizes their collection by suit in the Circuit Court.

In treating this question, Page & Jones, on Taxation by Assessment, Section 119, uses this language:

"The general rule is that at some time before the assessment becomes an absolute finality there must be a notice to the property owner and an opportunity for a hearing as to those questions of fact which concern the amount of the assessment to be imposed upon such property, except such as the legislative power has authority to determine without special enquiry, and has in fact so determined. . . . . If such notice is not given and under the law the assessment becomes a finality, subject to be enforced summarily, without giving any opportunity for a hearing as to the question of fact which concern the amount of the assessment other than those which the legislative power has authority to determine without special enquiry, and which the legislative power has in fact so determined, such assessment then constitutes a taking without due process

of law, and is in violation of the constitutional provision under consideration."

In Section 132 the same authority says:

"If the assessment is to be enforced summarily without notice or judicial proceedings, it is evidence that no opportunity is thereby given to the property owner to contest the assessment on its merits. . . . If notice has not been given at a prior stage of the proceedings so that the property owner has an opportunity to contest the assessment on its merits, the proceeding is in violation of the constitutional provision which forbids the taking of property without due process of law."

Also Pash vs. City of St. Joseph, not yet reported.

In Section 773 the same authority says:

"If the assessment can be enforced only by an action at law or a suit in equity, and in such proceeding the property owner is given a full opportunity to be heard upon the question of benefits, the property owner is not entitled, as of constitutional right, in the absence of statutory provision therefor, to any notice, except that of the institution of such proceedings to enforce the assessment."

In Hagar v. Reclamation District, 111 U. S. 701, it is held that:

"A law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the Fourteenth

Amendment of the Constitution which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity, or the amount of it, either before that amount is determined or in a subsequent proceeding for its collection."

The same ruling has been announced by this Court in the following cases:

City of St. Louis v. Richeson, 76 Mo. 470; Kansas City v. Huling, 87 Mo. 203; Saxton National Bank v. Carswell, 126 Mo. 436; Springfield v. Weaver, 137 Mo. 650-672.

The case of the City of St. Louis v. Rankin, 96 Mo. 497, is not in conflict with the principles of law announced in the foregoing cases. In that case the question was, had the provisions of an ordinance of the city authorized the improvements to be made, and the assessment of benefits thereof, been complied with?

Said ordinance provided that notice should be given of the establishment of the benefit district, the time and place of making the assessments, and giving the property owners the right to be then heard upon those propositions. This ordinance was wholly ignored and this court held, and properly so, that the assessments were void because those provisions of the ordinance had not been complied with.

While it is true, in that case the charter and ordinance of the city provided, as do those of most

CONCLUSION.

It will be seen from the foregoing that plaintiffs in error contend that the statute in question is not a legislative determination of a benefit district, but delegates the authority to say what property should be included in said district to an interested body of property owners; that the framework of the statute positively precludes any review of the decision of the property owners on this question until a suit is brought one one of the installments of the benefit for the purpose of collecting it; that the provisions of the statute contain both an explicit and an implied negation of the right of the property owners to raise this defense, even in any of these suits; that if they could then raise such defense, both the time and circumstances preclude it from then being an adequate remedy; that the Supreme Court of Missouri in its decision has held that the property owners are not entitled to make any such defense at any time, because they say there is a legislative determination of the benefit district; that the state Supreme Court is right in holding that under the statute no such defense can be made at any time, but is wrong in saying that there is a legislative benefit district and therefore that we are not entitled, under the due process of law clause of the Constitution, to make this defense, and therein deny due process of law.

Of all the foregoing questions there is just one that is of first importance and substantially decides this case, and that is, "Is or is not this a case of legislative benefit district?" "Is the property owner entitled to a hearing on whether his property is benefited or not?"

Because if we are wrong on this primary question, if the property owner is entitled to no such hearing, then, of course, the decision in the Supreme Court of Missouri should be affirmed, and what is more, the statute in question should be sustained and is a fairly reasonable and practical statute. Roads can be built under it.

On the other hand, if we are correct in our contention that we are entitled to such a hearing, then the statute is either void or else, by construction, its provisions must be so perverted as to render the effect well-nigh absurd, because it must then present a case of selling benefits running into large amounts of money for cash which stand merely on the opinions of a prejudiced and interested body of men that certain property will be benefited, leaving the fact of a benefit or no benefit to be tried out afterwards at the expense of the property owners and the purchasers of the benefits, selling a tax for cash that is not assessed *in fact* or fixed in amount.

No Legislature would intentionally pass such an act and we do not believe that an act passed by

the Legislature should be so construed by the highest court of the land that it will be given this effect. Yet we respectfully submit to Your Honors that you have no alternative, you must either hold that the act in question provides for such a selling of an unassessed tax and that such a provision is not offensive to the Constitution, or hold that the act is bad.

Again the Supreme Court of Missouri was asked squarely to decide this principal question and it either refused or misstated the question in its opinion; it refused to put itself on record when its attention was plainly called, in a motion for a rehearing, to the fact that it had failed to decide (at least in terms) the principal question in the case, so that we say that if we are right about being entitled to the hearing we claim, there ought to be no reason why this statute shall be sustained contrary to the provisions of the statute itself, by rendering the statute a working impossibility and an absurdity, especially when the state Supreme Court refused the burden of expressly construing the statute on the point in question; that is, it either so refused or else it denied the hearing that was necessary to constitute due process.

The opinion of this court in this case will be far more important as a precedent and guide in the formation of future statutes where this ques-

tion is involved than as a decision between the parties in this particular case.

Neither the cause of good roads nor the progress of law can be assisted by giving even qualified sanction to this statute; if the statute is in fact vicious and really infringes the due process of law clause of the Constitution, nothing but good can come from a clear determination of the point wherein the fault of the statute lies.

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EMBREE *v.* KANSAS CITY AND LIBERTY BOULEVARD ROAD DISTRICT.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 187. Argued January 18, 19, 1916.—Decided February 21, 1916.

Where a taxing district is not established by the legislature, but by exercise of delegated authority, there is no legislative decision that its location, boundaries and needs are such that the lands therein are benefited, and it is essential to due process of law that the landowners be accorded an opportunity to be heard on the question of benefits.

Where a statute delegating authority for establishment of taxing districts provides for a hearing on the question of benefits, the decision of the designated tribunal is sufficient; and, unless made fraudulently or in bad faith, due process is not denied.

A statute requiring adequate public notice of the time and place of presentation of the petition for the creation of a tax district and providing for presentation of remonstrances with power to the designated tribunal to hear the petition and remonstrances and to make such changes in the boundaries of the proposed district as the public good may require, not only contemplates a hearing, but authorizes the tribunal to so adjust the boundaries as to include

only such lands as may reasonably be expected to be benefited by the improvement.

There is an inseparable union between the public good and due regard for private rights.

An adequate hearing may be had before a delegated tribunal authorized to establish taxing districts for roads and to declare what lands shall be included therein as being benefited and due process of law accorded to the owners, although the particular roads to be improved may not have been designated.

A legislative act establishing zones of benefits with graduated ratings for assessments in districts lawfully created does not deny due process of law where it does not provide for a hearing on this particular feature, unless the legislative apportionment is so arbitrary and devoid of any reasonable basis as to amount to an abuse of power.

Although no hearing may be afforded to owners of land within a taxing district on the appraisal of their lands for the purpose of apportioning the tax, if such a hearing is accorded when the tax is sought to be enforced, due process of law is not denied.

Revised Stat. Missouri 1909, c. 102, art. 7, and Missouri Laws 1911, 373, providing for establishment of road improvement districts and the issuing of bonds and levying of special taxes therefor, are not unconstitutional under the due process provision of the Fourteenth Amendment.

257 Missouri, 593, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of proceedings under the applicable statute of Missouri for issuing and selling road district bonds and levy of special taxes to pay them, are stated in the opinion.

Mr. Harris L. Moore, with whom *Mr. John M. Cleary* and *Mr. James F. Simrall*, *Mr. Ernest Simrall* and *Mr. W. A. Craven* were on the brief, for plaintiff in error:

Where the power to determine the boundaries of the benefit district, and what property shall be assessed to pay for an improvement, is delegated to a non-legislative body, due process of law demands notice and a hearing on

whether the property so marked out for taxation is, in fact, benefited. *Fallbrook District* v. *Bradley*, 164 U. S. 170; *Argyle* v. *Johnson*, 118 Pac. Rep. 487; *Spencer* v. *Merchant*, 125 U. S. 345; *Soliah* v. *Haskin*, 222 U. S. 522; *In re Kissel Ave.*, 143 N. Y. Supp. 467; *Bauman* v. *Ross*, 167 U. S. 548.

While it is true that ordinarily a benefit assessment that must be collected by suit cannot be said to be wanting in due process of law, yet if in such suit the property owner cannot have tried the question of whether his property is benefited, then such suit does not constitute due process of law as to that question, or supply the lack of a hearing thereon. *Londoner* v. *Denver*, 210 U. S. 373, 385; *In re Riverside Park*, 138 N. W. Rep. 426; *Argyle* v. *Johnson*, 39 Utah, 500; *Central of Georgia Ry.* v. *Wright*, 207 U. S. 127; *Norwood* v. *Baker*, 172 U. S. 269.

The decision of the Supreme Court of Missouri, in so far as it construes the statute in question, is conclusive, and where it has held that the statute contains a legislative determination of the benefit district, then that is a conclusive decision that there is no hearing on that question, when suit is brought to collect. *Central of Georgia Ry.* v. *Wright*, 207 U. S. 127.

While the fact that a benefit assessment is to be collected by suit ordinarily constitutes due process of law, yet when a benefit assessment has become a final lien, divided into twenty installments, recorded in the public records as a lien on the land, and sold for cash, even if it is a fact that each property owner may defend each of the twenty suits required to be brought against each separate piece of property, being subject to heavy penalties and attorneys' fees in case of failure to make good the defense in whole or in part, there is neither such timely nor adequate hearing as is necessary to constitute due process of law. See cases *supra*.

Mr. William M. Williams and *Mr. Claude Hardwicke* for defendants in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to restrain the issue and sale of road district bonds and the levy and recordation of special taxes to pay them. A trial of the issues resulted in a judgment for the defendants, which at first was reversed and on a rehearing was affirmed. 257 Missouri, 593. The plaintiffs prosecute this writ of error.

When the suit was begun the road district had been organized, a road had been selected for improvement and preliminary steps had been taken for issuing the bonds and levying the special taxes—all conformably to the local statute. Rev. Stat. Mo. 1909, c. 102, art. 7; Mo. Laws 1911, 373. The district is about seven miles in length and three in width, and is bounded on the greater part of one side by the Missouri River. The road selected for improvement extends through the district in the direction of its length. The cost of the improvement is to be met temporarily by the issue and sale of bonds and ultimately by the levy and collection of special taxes upon all the lands in the district. The cost is to be apportioned by rating the lands—without the buildings thereon—at their full fair value where lying within one mile of the road, at seventy-five per cent. of such value where lying between one and two miles from the road and at fifty per cent. of such value where lying more than two miles therefrom (all seem to be within two miles here), and then charging each tract with a share of the entire cost corresponding to its proportion of the value of all the lands as so rated. The lands are appraised by the district commissioners and the cost of the improvement is apportioned by the county clerk.

The plaintiffs own lands within the district and object to the issue of the bonds and to the levy of the special taxes, upon the ground that the scheme for subjecting the lands to the payment of the cost is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States in that the land owner is not afforded any opportunity to be heard on the questions whether his lands will be benefited by the improvement, whether, if benefited, the benefits in the different zones will be in accord with the graduated ratings before indicated, and whether the appraisement of his lands for the purposes of the apportionment is fair.

The district was not established or defined by the legislature but by an order of the county court made under a general law. Whether there was need for the district and, if so, what lands should be included and what excluded was committed to the judgment and discretion of that court subject to these qualifications: First, that the district should contain at least 640 acres of contiguous land and be wholly within the county; second, that the court's action should be invoked by a petition signed by the owners of a majority of the acres in the proposed district, and, third, that public notice—conceded to be adequate—should be given, by the clerk of the court, of the presentation of the petition and the date when it would be considered, and that owners of land within the proposed district should be accorded an opportunity to appear, either collectively or separately, and oppose its formation. In this connection the statute says: "The court shall hear such petition and remonstrance, and shall make such change in the boundaries of such proposed district as the public good may require and make necessary, and if after such changes are made it shall appear to the court that such petition is signed or in writing consented to by the owners of a majority of all the acres of land within the district as so changed, the court shall make a prelim-

inary order establishing such public road district, and such order shall set out the boundaries of such district as established . . . but the boundaries of no district shall be so changed as to embrace any land not included in the notice made by the clerk unless the owner thereof shall in writing consent thereto, or shall appear at the hearing, and is notified in open court of such fact and given an opportunity to file or join in a remonstrance." The order actually made shows that four of the present plaintiffs, with three others, appeared in opposition to the petition, recites that "the court, after hearing and considering said petition and said protests and remonstrances and all evidence offered in support thereof, finds that the public good requires and makes necessary the organization, formation and creation of such proposed public road district . . . with boundaries as stated in said petition," and sets out the boundaries of the district as established.

The sole purpose in creating the district, as the statute shows, was to accomplish the improvement of public roads therein—the particular roads to be designated by the district commissioners and an approving vote of the land owners.

As the district was not established by the legislature but by an exercise of delegated authority, there was no legislative decision that its location, boundaries and needs were such that the lands therein would be benefited by its creation and what it was intended to accomplish, and, this being so, it was essential to due process of law that the land owners be accorded an opportunity to be heard upon the question whether their lands would be thus benefited. If the statute provided for such a hearing, the decision of the designated tribunal would be sufficient, unless made fraudulently or in bad faith. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 167, 174–175.

Did the statute contemplate such a hearing? We have

seen that it required that adequate public notice be given of the presentation of the petition for the creation of the district and the time when it would be considered, made provision for the presentation of remonstrances by owners of lands within the proposed district, and directed that the petition and remonstrances be heard by the county court, that the court make such change in the boundaries "as the public good may require" and that the boundaries be not enlarged unless the owners of the lands not before included consent in writing or appear at the hearing and be given an opportunity to present objections. That a hearing of some kind was contemplated is obvious, and is conceded. But it is insisted that it was not to be directed to the question whether the lands included would be benefited by the creation of the district and what it was intended to accomplish. If that were so, there would be little purpose in the hearing and no real necessity for it.

True, the statute does not in terms say that lands which will not be benefited shall be excluded or that only such as will be benefited shall be included, but it does say that the court shall make such change in the proposed boundaries "as the public good may require." In the presence of this comprehensive direction there can be no doubt that the legislature intended to authorize and require the county court to adjust the boundaries so they would include only such lands as might be reasonably expected to be benefited by the improvement of the district roads and therefore might be properly charged with the cost of that work. That there is an inseparable union between the public good and due regard for private rights should not be forgotten.

Of course, the nature and extent of the hearing contemplated by the statute is a question of local law, and if it were clear that the Supreme Court of the State had settled it we should accept and follow that ruling. Whether

the question has been settled is at least uncertain. In the principal opinion delivered on the original hearing that court said: "We hold that the General Assembly in granting to land owners of a proposed road district the privilege of being heard by remonstrance intended that such land owners should have the right in such remonstrance to urge against the organization of the district or the inclusion of their lands therein any statutory or constitutional grounds which such land owners may possess; and that if such grounds be valid the court may exclude the lands of the remonstrants or refuse to incorporate the proposed district. This ruling is rendered necessary to avoid the conclusion that the General Assembly directed a hearing without intending that any relief might thereby be obtained." That opinion, although copied into the record, does not appear in the Missouri Reports. They contain only the opinion delivered on the rehearing. The former may have been entirely recalled. If so, the question dealt with in the quotation made from it has not been settled, for the later opinion is silent upon the subject. But whether the question be settled or open is not of much importance, for, as before indicated, our view of the statute accords with that expressed by the state court in the excerpt from the first opinion.

We conclude therefore that the statute did provide for according the land owners an opportunity to be heard, when the district was created, upon the question whether their lands would be benefited, and also that the order establishing the district shows that the statute was complied with in that regard.

But in opposition to this conclusion it is urged that an adequate hearing could not be had at that time because the road to be improved had not been selected and no one could say what lands would be benefited. We are not impressed with this contention. As was well under-

stood, the purpose in creating the district was to bring about the improvement of its roads. Their number, location and condition were known, as was also the extent and nature of their use. The district was of limited area and the proximity or relation of every part to each road was patent. As applied to such a situation, we perceive no serious obstacle to determining with approximate certainty and satisfaction whether the improvement of any one or more of the roads—even though no particular one was as yet selected—would be of benefit throughout the district. We say with approximate certainty and satisfaction, because this is all that is required. At best the question is one of opinion and degree, even where the improvement to be made has been definitely determined. The boundaries of drainage, irrigation and other benefit districts are often defined in this way. Indeed, it is conceded that had the legislature created this particular district the present objection would be untenable. If such a body can obtain the requisite information and exercise the requisite judgment, it is not easy to believe that the task would be more difficult for a county court sitting in the vicinity.

The claim that the land owners are entitled to a hearing on the question whether the benefits in the different zones will be in accord with the graduated ratings of their lands is not seriously pressed upon our attention and requires but brief notice. The ratings are not fixed in the exercise of delegated authority but by the statute itself, which must be taken as a legislative decision that in a district lawfully constituted, in the manner before indicated, the benefits to the lands in the different zones will be in approximate accord with the ratings named. This being so, no hearing is essential to give effect to this feature of the apportionment. A legislative act of this nature can be successfully called in question only when it is so devoid of any reasonable basis as to be essentially arbitrary and

an abuse of power (*Wagner* v. *Leser*, 239 U. S. 207; *Houck* v. *Little Drainage District*, 239 U. S. 254; *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478; *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55. And see *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441, 445–446), which obviously is not the case here.

The claim that the land owners are not afforded an opportunity to be heard in respect of the value of their lands is also untenable. While no hearing is given when the lands are appraised one is accorded when the tax is sought to be enforced. The mode of enforcement is by a suit in a court of justice, when, as the Supreme Court of the State holds, owners aggrieved by the valuation may have a full hearing upon that question. This is due process. *Davidson* v. *New Orleans*, 96 U. S. 97, 104; *Hagar* v. *Reclamation District*, 111 U. S. 701, 711.

Judgment affirmed.